(1)

No. 06163[illegible] 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL ADAM DAVIDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN WESLEY HALL, JR.*
1311 Broadway
Little Rock, AR 72202
501-371-9131

**Counsel of Record*

ARTHUR MADDEN
MADDEN & SOTO
465 Dauphin Street
Mobile, AL 36602
251-432-0380

DAN JUENGEL
FRANK & JUENGEL
7777 Bonhomme Ave., Ste. 1601
St. Louis, MO 63105
314-725-7777

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In an ineffective assistance challenge to a guilty plea that waived a suppression motion, the Court of Appeals erred in effectively combining *Strickland*'s objective prejudice and performance prongs into what became a single subjective inquiry based on counsel's not fully informed impressions which it nevertheless found constitutionally adequate contrary to *Hill v. Lockhart* and *Kimmelman v. Morrison*.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	17
I. In an ineffective assistance challenge to a guilty plea that waived a suppression motion, the Court of Appeals erred in effectively combining *Strickland*'s objective prejudice and performance prongs into what became a single subjective inquiry based on counsel's not fully informed impressions which it nevertheless found constitutionally adequate contrary to *Hill v. Lockhart* and *Kimmelman v. Morrison*	17
A. *Strickland* and the objective standard of reasonableness	17
B. Subjective beliefs of defense counsel are inappropriate under *Strickland* (or are they?), and there is a split in the circuits on this issue	22
Conclusion	26
Appendices	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983)..13, 18

Bell v. Cone, 535 U.S. 685 (2002).....17, 18

Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), *cert. den.* 516 U.S. 1051 (1996) 23

Brady v. Maryland, 373 U.S. 83 (1963).....*passim*

Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002), *cert. den.* 537 U.S. 1093 (2002) 25

Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) (en banc), *cert. den.* 531 U.S. 1204 (2001) 23

Cofske v. United States, 290 F.3d 437 (1st Cir. 2002)..... 23

Davidson v. United States, Appl. No. 06A970 (April 18, 2007) 2

Davidson v. United States, 213 Fed. Appx. 769 (11th Cir. 2007) (*per curiam*).....1, 2, 12, 14

Davidson v. United States, 138 Fed. Appx. 238 (11th Cir. 2005)..... 1, 10

Davidson v. United States, 2006 WL 1155940 (S.D. Ala. 2006) .....*passim*

Davidson v. United States, CR02-00058-CB (S.D. Ala. July 19, 2004) 1

Florida v. Nixon, 543 U.S. 175 (2004) 18

Franks v. Delaware, 428 U.S. 134 (1978).....3, 9, 20

Greiner v. Wells, 417 F.3d 305 (2d Cir. 2005), *cert. den. sub nom. Wells v. Ercole*, 126 S.Ct. 1363 (2006)..... 24

Hill v. Lockhart, 474 U.S. 52 (1985).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Kimmelman v. Morrison, 477 U.S. 365 (1986) 17, 20, 21

Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000) 25

Poole v. Estep, 2006 WL 2788233 (D. Colo. Sept. 15, 2006), *certificate of appealability den. sub nom. Fogle v. Estep*, 2007 WL 901920 (10th Cir. 2007) 23

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 17, 19, 21, 22

Rompilla v. Beard, 545 U.S. 374 (2005) 17

Schriro v. Landrigan, 127 S.Ct. 1933 (2007) 17

Sallahdin v. Mullin, 380 F.3d 1242 (10th Cir. 2004), *cert. den.* 544 U.S. 1052 (2005) 25

Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*

Strouse v. Leonardo, 928 F.2d 548 (2d Cir. 1991) 24

Thomas v. Varner, 428 F.3d 491 (3d Cir. 2005), *cert. den. sub nom. Palakovich v. Thomas*, 127 S.Ct. 928 (2007) 25

Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996) 24

United States v. Bailey, 272 F. Supp. 2d 822 (D. Neb. 2003) 13, 21

United States v. Chagra, 701 F.2d 354 (5th Cir. 1983) 21

United States v. Criden, 675 F.2d 550 (3d Cir. 1982) 21

United States v. Davidson, 360 F.3d 1374 (11th Cir. 2004) 2, 9, 10, 11

United States v. Froman, 355 F.3d 882 (5th Cir. 2004) 21

United States v. Shields, 458 F.3d 269 (3d Cir. 2006) ... 13, 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Strauser, 03-1909 (8th Cir.).....4, 8, 15

United States v. Strauser, 4:02CR82 CDP (E.D. Mo. Sept. 3, 2002)..... 6, 14

United States v. Strauser, 247 F. Supp. 2d 1134 (E.D. Mo. 2003)..... 8

Wiggins v. Smith, 539 U.S. 510 (2003) 17, 19

Williams v. Taylor, 528 U.S. 362 (2000) 19, 24

CONSTITUTIONAL PROVISIONS:

Fourth Amendment, U.S. Const. 4

Sixth Amendment, U.S. Const.....*passim*

STATUTES AND RULES:

18 U.S.C. § 2252A(a)(2)..... 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2255..... 1, 3

U.S.S.G. § 3E1.1..... 9, 19

Fed. R. App. P. 42(b)..... 8

OTHER AUTHORITIES:

Frances A. Cavanagh, *Probable Cause in a World of Pure Imagination: Why the Candyman Warrants Should Not Have Been Golden Tickets to Search,* 80 ST. JOHN'S L. REV. 1091 (2006) 3

ABA STANDARDS, *The Defense Function* § 4-5.2 (3d ed. 1993) 18

PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Adam Davidson, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in this case affirming the denial of his petition for post-conviction relief against his conviction brought under 28 U.S.C. § 2255.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished but reported as *Davidson v. United States,* 213 Fed. Appx. 769 (11th Cir. Jan. 4, 2007), and it is reproduced in App. A (App. 1). Rehearing was denied on February 6, 2007, and it is reproduced in App. H (App. 65).

The opinion of the District Court is unpublished but reported as *Davidson v. United States,* 2006 WL 1155940 (S.D. Ala. May 1, 2006), and it is reproduced in App. C (App. 9). The judgment is reproduced in App. B (App. 8). The District Court's grant of the certificate of appealability was issued June 12, 2006, and it is reproduced in App. D (App. 36).

In petitioner's prior appeal, the Court of Appeals reversed the District Court's denial of post-conviction relief without a hearing, and it remanded for an evidentiary hearing under *Hill v. Lockhart,* 474 U.S. 52 (1985). *Davidson v. United States,* 138 Fed. Appx. 238 (11th Cir. June 24, 2005). That opinion is reproduced in App. E (App. 38).

The District Court's initial denial of relief under § 2255 is unreported. *Davidson v. United States,* CR02-00058-CB (S.D. Ala. July 19, 2004), and it is reproduced in App. F (App. 42).

The government appealed the sentence, and it was affirmed. It is reported at *United States v. Davidson,* 360 F.3d 1374 (11th Cir. March 5, 2004), and it is reproduced in App. G (App. 60).

JURISDICTION

The U.S. Court of Appeals for the Eleventh Circuit affirmed the denial of post-conviction relief on January 4, 2007. *Davidson v. United States,* 213 Fed. Appx. 769 (11th Cir. Jan. 4, 2007) (*per curiam*). (App. A, App. 1) Rehearing was denied on February 6, 2007. (App. G, App. 65)

On April 18, 2007, Justice Thomas granted an extension of time to file the petition for writ of certiorari to June 6, 2007. *Davidson v. United States,* Appl. No. 06A970 (April 18, 2007).

Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This case derives from the government's "Candyman" Yahoo! Egroup investigation in 2001-02.[1] Petitioner was one person of many whose homes and computers were searched under a search warrant which had template affidavit language prepared by FBI agents in Houston, Texas, that turned out to be a significant potential violation of *Franks v. Delaware,* 428 U.S. 134 (1978). It was enough for another U.S. District Court in Missouri to suppress and the government appeal and then dismiss the case and the appeal because of the template affidavit preparer's false statements material to the probable cause determination.

Petitioner was indicted for receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2). He pled guilty pursuant to a written plea agreement on September 30, 2002, and he was sentenced on January 24, 2003 to 33 months imprisonment, three years supervised release, and sex offender registration.[2] After the guilty plea and while the government was unsuccessfully appealing his sentence, petitioner filed this action to set aside his conviction under 28 U.S.C. § 2255 under *Hill v. Lockhart* that his trial counsel was ineffective in recommending petitioner plead guilty when counsel was objectively uninformed as to all the facts necessary to evaluate the suppression motion.

---

[1] *See* Frances A. Cavanagh, *Probable Cause in a World of Pure Imagination: Why the Candyman Warrants Should Not Have Been Golden Tickets to Search*, 80 ST. JOHN'S L. REV. 1091 (2006).

[2] Supervised release ends in August 2008, but the sex offender registration will continue well beyond that.

1. After petitioner's indictment, he was insistent with trial counsel that he wanted to challenge the search warrant, and he directed his trial counsel to do so. On his own, petitioner found several errors in the Candyman template affidavit. On the advice of counsel, petitioner ultimately pled guilty after his trial counsel told him that the Fourth Amendment claim was "hopeless" and "dead" or a "dead duck" and he had "No chance, zero chance" of prevailing on the motion because "the Fourth Amendment had withered on the vine." Trial counsel, however, had not fully apprised himself of the facts available to him when he advised petitioner to plead guilty, and this was the basis for the ineffective assistance claim. The District Court found that trial counsel was on notice as to certain things but held that it did not matter under its final analysis.

Trial counsel's advice was premised on the first U.S. District Court case to decide a Candyman search warrant, *United States v. Strauser,* 4:02CR82 CDP (E.D. Mo. Sept. 3, 2002),[3] where the Eastern District of Missouri found adequate support for a *Franks* challenge on the Candyman template search warrant affidavit, but held that the warrant was executed in good faith. Strauser then pled guilty. It is not disputed, however, that petitioner's trial counsel failed to remain apprised of the subsequent developments in his own case, not to mention Strauser's,

---

[3] The published opinion in *Strauser* states that this occurred on September 3, *2003*. *United States v. Strauser*, 247 F. Supp. 2d 1134, 1136 (E.D. Mo. 2003). That opinion, however, states that it was issued March 6, 2003, and the District Court's PACER docket shows that date. (E.D. Mo. docket Doc. 75) The *Strauser* docket sheet shows that the published opinion was incorrect as to the year of the initial order denying suppression: It was *2002*. (E.D. Mo. docket Doc. 58)

and he convinced petitioner to plead guilty, which happened on September 30, 2002.

2. The timeline is important to the events in this case:

a. After his indictment, petitioner was aware of articles from the *St. Louis Post-Dispatch* concerning the motion to suppress in *Strauser* and the first *Brady*[4] development that the template affidavit was false. He told his trial counsel twice. Trial counsel contacted Strauser's attorney in St. Louis by letter July 30, 2002, and he obtained copies of the suppression materials from Strauser's counsel who sent them to trial counsel by Federal Express on August 14, 2002. On August 19, 2002, trial counsel sought an extension of time in which to file motions stating that "the defendant intends to file . . . [a] . . . Motion to Suppress the search of the residence of the Defendant," and this extension motion was granted. The week of August 19, 2002, defendant and his father both faxed reminders to trial counsel requesting that counsel confer with petitioner before filing the motion to suppress. As already stated, petitioner in the meantime did his own detailed analysis of the affidavit.

A superseding indictment was returned against petitioner on August 30, 2002. This started the pretrial motions clock again. Pretrial motions were due September 27, 2002, but no motion to suppress was ever filed, despite petitioner's repeated requests.

By letter dated September 18, 2002, two weeks before petitioner's guilty plea and less than two weeks after the

---

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

initial opinion in *Strauser,* the government notified trial counsel of the *Brady* material that the affidavit for the search warrant was incorrect. The government did so in all the Candyman cases. As the District Court noted in its order denying relief:

> For the government to admit error in a search warrant affidavit is an exceptional circumstance; for the government to provide two letters on the issue is extraordinary. Consequently, any reasonable attorney in Mr. Horne's situation would have made further inquiry to find the letter he did not have and would have discovered evidence of deliberate or reckless falsehood in the search warrant affidavit. But the evaluation of a search warrant affidavit for possible suppression under the Fourth Amendment does not begin and end with a determination that the government lacked good faith. Even where an affidavit contains deliberate or reckless falsehoods, the evidence is admissible under *Franks* if the affidavit contains other information sufficient to support a finding of probable cause. Thus, the reasonableness of counsel's conduct turns on his analysis of the suppression issue under *Franks*.

Davidson v. United States, 2006 WL 1155940, *10 (S.D. Ala. May 1, 2006) (App. 32).

Despite the *Brady* letter, and despite the District Court's finding that trial counsel was on notice that something was seriously awry in the template affidavit in the Candyman cases, trial counsel still seemed unaware of its content or even its import, and he met with petitioner and his parents in Illinois on September 21, 2002. Trial counsel had orders from the *Strauser* case, and he told petitioner that he simply could not win a suppression

motion: There was "No chance. Zero chance" (Tr. 72-73); the issue was a "dead duck" or "hopeless" (Tr. 195). The possibility of litigating the suppression motion and then entering into a conditional plea to preserve the suppression issue was never mentioned to petitioner (Tr. 74-75, 191), as the District Court found:

> Horne did not discuss with petitioner a conditional plea that might have allowed him to have the suppression issue ruled on but preserved for appeal, nor did he discuss the possibility of pleading not guilty and litigating the motion to suppress. Following counsel's advice, petitioner reluctantly decided to plead guilty.

2006 WL 1155940, *8 (App. 25).

Later, trial counsel was still unaware of the second *Brady* letter from the government because it was misdelivered, but the District Court found that he should have been aware because it was referred to in other letters from the government received before the plea.[5] It appears that trial counsel was either in complete denial or never read the letter.

> The government's September 16th letter – informing defense counsel that Binney did not join Candyman via email as he had testified in Strauser – was sufficient to put counsel on notice that the *Leon* good faith exception did not apply. Horne did not receive the September 16th letter;

---

[5] The second *Brady* letter was misaddressed when sent by the government, and it was not received by trial counsel until October 9, 2002, after petitioner's guilty plea. The government sent a letter before the plea, however, which referred to this second *Brady* letter, and the District Court found trial counsel was on notice.

> however, he should have known about it. A subsequent letter (Exhibit DD) faxed to Horne prior to the guilty plea referred to two previous letters from the United States Attorney regarding Binney and the search warrant affidavit.

2006 WL 1155940, *10 (App. 31-32; footnote omitted). This was in the context of the "extraordinary" admission by the government, quoted *supra,* which appears just after this in the District Court opinion.

Finally, on September 30, 2002, petitioner, on advice of his counsel, pled guilty.

b. Meanwhile, after the initial September 3, 2002 opinion in *Strauser* that trial counsel was relying upon and after the *Brady* letter made the *Franks* challenge completely viable, despite Strauser's guilty plea but before sentencing, the *Strauser* court revisited the Fourth Amendment claim and suppressed the search. *United States v. Strauser,* 247 F. Supp. 2d 1135 (E.D. Mo. March 6, 2003).[6] The government appealed the *Strauser* suppression order, but it moved to dismiss the case on April 18, 2003.[7]

---

[6] This date, it must be noted, was after petitioner's sentencing which occurred on January 24, 2003.

[7] Nowhere in the other cases or the legal literature is it mentioned that the government appealed the District Court's order in *Strauser* to the U.S. Court of Appeals for the Eighth Circuit, *United States v. Strauser*, 03-1909 (8th Cir.), but then moved to dismiss the case against Strauser in both the District Court and the Court of Appeals on April 18, 2003, and it was granted. According to PACER, the government moved to dismiss the case in both the District Court (E.D. Mo. 4:02CR82 (CDP) Doc. 81 (April 18, 2003)) and the Eighth Circuit on April 18, 2003 ("JUDGMENT: granting appellant motion to dismiss case. . . . The case is dismissed in accordance with Rule 42(b), Federal Rule of Appellate Procedure. . . . Mandate shall issue forthwith. . . .").

Even after that, trial counsel here did not seek to revisit the warrant issue by collateral relief.

c. On January 24, 2003, petitioner was sentenced to 33 months imprisonment, supervised release, and ordered to register as a sex offender. He was incarcerated on March 26, 2003. He has served the sentence of incarceration, but he remains on supervised release until August 2008, and he will remain a registered sex offender for years after that. The government appealed the sentence and lost. *United States v. Davidson,* 360 F.3d 1374 (11th Cir. 2004). (App. G; App. 60)

3. These post-conviction proceedings:

a. Petitioner filed his petition to vacate his conviction under 28 U.S.C. § 2255 before the direct appeal was even concluded. The District Court denied relief without a hearing. *United States v. Davidson,* CR02-00058-CB (S.D. Ala. July 19, 2004). (App. F; App. 42)

b. The U.S. Court of Appeals for the Eleventh Circuit, however, reversed and remanded for an evidentiary hearing on whether petitioner satisfied the standard of *Hill v. Lockhart,* 474 U.S. 59 (1985), that petitioner would not have pled guilty but for trial counsel's ineffective assistance:

> The second claim raised in the § 2255 motion is one of ineffective assistance of counsel in connection with the guilty plea. The alleged shortcomings of counsel concern his actions (or inactions) and his advice involving the search warrant issues. The district court rejected this claim based on its view that a motion to suppress the evidence obtained from the search would have failed under the test set out in *Franks v. Delaware,* 438

> U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). That is not, however, the test for the prejudice prong of an ineffective assistance of counsel claim relating to the entry of a guilty plea. Instead, the prejudice inquiry is focused on whether, if counsel had not performed ineffectively, Davidson still would have pleaded guilty. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).
>
> It may be that before Davidson pleaded guilty counsel communicated to him all of the information counsel had (and reasonably should have had) bearing on the search warrant issue, and gave Davidson reasonable advice concerning that issue. If counsel did that, the ineffective assistance of counsel claim fails on the performance prong. However, if counsel did not perform within the wide range of reasonable professional assistance, under the *Hill* decision this claim will turn on whether Davidson would have pleaded not guilty but for the ineffective assistance. Both of those issues should be addressed in an evidentiary hearing.

Davidson v. United States, 138 Fed. Appx. 238, 240 (11th Cir. 2004) (App. 39-40). Based on the language of the remand, with these facts, one would think that petitioner would have prevailed in the District Court. But he did not.

c. On remand, the District Court conducted an evidentiary hearing where trial counsel and petitioner testified, and the District Court found many of the facts in petitioner's favor. The final ruling, however, denied relief. *United States v. Davidson,* 2006 WL 1155940 (S.D. Ala. 2004) (App. C, App. 9).

The District Court found prejudice in counsel's failure to challenge the search of petitioner's home and computer, but it found that issue moot because defense counsel's performance was not deficient, *id.* at *10 n.12 (App. 20-21, n.12),[8] despite finding that trial counsel was on notice of the "extraordinary" circumstance of the government providing the *Brady* letter about the false statement in the affidavit for search warrant before the plea. *Id.* at *10 (App. 32), quoted *supra*.

In finding that petitioner was not entitled to relief, the District Court inexplicably merged *Strickland*'s[9] performance and prejudice prongs after having found prejudice. On the one hand, the court found petitioner was prejudiced by trial counsel's failure to litigate suppression. But, on the other, found that counsel's performance was not constitutionally inadequate because petitioner could not prevail on the merits of the suppression motion, even though the record on which to decide a suppression motion had not been developed or presented. After all, the parties were litigating ineffective assistance of counsel under *Hill v. Lockhart*, and the District Court delved into the merits of the search issue even though it was not fully before the

---

[8] Note 12 provides:

> Since the Court has concluded that counsel's advice was not erroneous, the question of prejudice, *i.e.*, whether petitioner would not have pled guilty but for counsel's "erroneous" advice, is moot. However, petitioner did present persuasive evidence that he strongly wished to pursue the suppression issue and only decided to abandon[ ] that issue and plead guilty after being persuaded by counsel that a suppression motion had no chance of succeeding. If counsel's advice had been erroneous, petitioner would succeed on the prejudice prong.

[9] *Strickland v. Washington*, 466 U.S. 668 (1984).

court to be litigated, except in the context of the remand to review whether or not petitioner would not have pled guilty but for the misadvice of his counsel.

Despite the finding of prejudice, the District Court used hindsight to find trial counsel's advice to not be constitutionally deficient under *Strickland*'s performance prong. The court reasoned that petitioner would not have prevailed in defense counsel's and the court's mind, even though a suppression motion had not been fully litigated and another Candyman defendant (Strauser) completely prevailed in his case on the search question.

Because reasonable jurists could disagree, the District Court issued a certificate of appealability. (App. D; App. 36)

d. Petitioner appealed to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed. *Davidson v. United States,* 213 Fed. Appx. 769 (11th Cir. Jan. 4, 2007) (*per curiam*) (App. A; App. 1).

The Eleventh Circuit seemingly was applying the correct standard in citing and quoting from *Strickland v. Washington*, as it eschews reliance on hindsight to determine the merits of an ineffective assistance claim,[10] 213 Fed. Appx. at 772 (App. 7) ("To conclude otherwise would require us to use the type of hindsight forbidden by *Strickland,* 468 U.S. at 689, 104 S.Ct. at 2065."), but it applied

---

[10] *Strickland*, 466 U.S. at 689:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

hindsight to determine that, because other courts had held Candyman warrants valid, this court would too, despite the fact that issue was not even being fully litigated in the case. (213 Fed. Appx. at 771-72; App. 6)[11]

The Court of Appeals also applied the wrong standard of review in relying on a pre-*Strickland* case: "A tactical decision is ineffective only 'if it was so patently unreasonable that no competent attorney would have chosen it.' *Adams v. Wainwright,* 709 F.2d 1443, 1445 (11th Cir. 1983)." 213 Fed. Appx. at 770 (App. 3-4).

Trial counsel was credited by the Court of Appeals, contrary to the District Court's findings of fact and conclusions of law, to have fully considered the implications of the first *Brady* letter from the government about the Candyman affidavit defect, but counsel was on notice there was a second letter that he had not seen at the time of the plea:

> The conclusion that Horne's advice rested upon – that the warrant would be upheld even after the statements in question were fully redacted – was not affected by the contents of the second letter. Nor could Davidson's decision to plead guilty

---

[11] Other courts have reached the same conclusion about the same template affidavit involved in this case that Horne reached when he decided not to file a motion to suppress. *See, e.g., United States v. Shields*, 458 F.3d 269, 278-81 (3d Cir. 2006); *United States v. Froman*, 355 F.3d 882 (5th Cir. 2004); *United States v. Bailey*, 272 F. Supp. 2d 822, 824-25 (D. Neb. 2003).

The Court of Appeals mentions reliance on *Strauser* "is misplaced," 213 Fed. Appx. at 771 (App. 6), but the court ignores the fact that *Strauser* prevailed and the government dismissed the case and the appeal the same day, but *after* petitioner pled guilty and was sentenced. *See* note 7, *supra*.

> have been, because he did so after considering Horne's opinion that the statements in question were made with knowledge of their falsity or with reckless disregard of it and for that reason would be redacted from the affidavit.

213 Fed. Appx. at 771 (App. 5).

These two sentences are inconsistent with the mandate of *Strickland*. First, it finds that trial counsel's advice that the search warrant would not be suppressed was not affected by the fact trial counsel did not apprise himself of the second *Brady* letter from the government of which he was on notice. Second, it finds that petitioner was relying on trial counsel's considered opinion, albeit an opinion that was essentially undermined and uninformed because trial counsel never read the second *Brady* letter from the government, even though he was on notice of it, the same letter that caused suppression in *Strauser*. Thus, we have false logic: How can petitioner be expected by the Court of Appeals to rely on an opinion of counsel that is manifestly and admittedly, by trial counsel and the District Court, misinformed by not learning all the facts? This is objectively a failure of the performance prong of *Strickland,* but the courts below did not find it so.

Finally, the case was in the District Court because the Court of Appeals had remanded in 2005 for an evidentiary hearing under *Hill v. Lockhart* on whether petitioner would have pled guilty but for counsel's errors. *Davidson v. United States,* 138 Fed. Appx. 238 (11th Cir. 2005) (App. E). The District Court reached that issue, 2006 WL 1155940, *9 (App. 28-29):

> In the context of guilty pleas, the second prong – the "prejudice" requirement – is satisfied if the

> petitioner "show[s] that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

Having found prejudice, the District Court should have turned to the performance prong of *Strickland* and found that trial counsel failed to provide petitioner effective assistance of counsel because he induced petitioner to plead guilty while remaining undisputably ignorant of the second Candyman *Brady* letter that fully supported a *Franks* challenge in this case, a challenge that was successful in *Strauser*. Petitioner was heavily involved and invested in his own case. Trial counsel's even taking care to address the second *Brady* letter with petitioner would have certainly induced petitioner to go forward and seek a suppression motion and conditional plea, as the District Court essentially found. 2006 WL 1155940, *8 (App. 25).

But this begs the question: Since trial counsel never read the letter, and petitioner did not find out that trial counsel should have known about it until preparing for the sentencing, how could trial counsel have satisfied *Hill*? He simply could not.

> When he returned to Mobile to prepare for sentencing, petitioner found the September 16th *Brady* letter from Maria Murphy in Horne's files. Petitioner was furious with his attorneys. Mr. Horne would not discuss the letter. Instead, he insisted to the petitioner that his focus should be on sentencing.

2006 WL 1155940, *8 (App. 26).[12] Trial counsel was deflecting his client's inquiry about his own failure of his performance in this case away from that and back to sentencing. Trial counsel should have done what trial counsel successfully did in *Strauser*: moved to reopen the case. Instead, he just would not talk about it. This is objectively unreasonable conduct for defense counsel with a duty to discuss all issues with his client.

Petitioner having prevailed in the District Court on prejudice, the Court of Appeals erred in not finding trial counsel's performance deficient as well.

---

[12] There is more. The District Court found that there was a post-sentencing delivery of more *Brady* material, and even that did not change its outcome:

> On April 1, 2003, the government provided petitioner's counsel with a CDRom containing 50 documents related to the Binney email issue. Those documents – which include court orders, testimony, statements, correspondence and other documents – appear to track the history of the investigation, discovery and repercussions of the false statements in Binney's template affidavit. After receiving this information, counsel filed a motion seeking to delay petitioner's incarceration, which was denied.

2006 WL 1155940, *8 n.11 (App. 27 n.11).

REASONS FOR GRANTING THE WRIT

I. In an ineffective assistance challenge to a guilty plea that waived a suppression motion, the Court of Appeals erred in effectively combining *Strickland*'s objective prejudice and performance prongs into what became a single subjective inquiry based on counsel's not fully informed impressions which it nevertheless found constitutionally adequate contrary to *Hill v. Lockhart* and *Kimmelman v. Morrison.*

This case presents an opportunity to explain the reach and implications of the "objective reasonableness" component of *Strickland v. Washington.* The issues presented by this petition involve direct application of *Strickland* itself and its single passing reference to subjective inquiries.

A. *Strickland* and the objective standard of reasonableness

1. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). This Court has never wavered from this standard. *See, e.g., Roe v. Flores-Ortega,* 528 U.S. 470, 476-77 (2000); *Bell v. Cone,* 535 U.S. 685, 690 (2002); *Wiggins v. Smith,* 539 U.S. 510, 521 (2003); *Rompilla v. Beard,* 545 U.S. 374, 380 (2005); *Schriro v. Landrigan,* 127 S.Ct. 1933, 1945 (2007).

The standard to be applied on review is "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [*Strickland*], at

694." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985); *Bell v. Cone,* 535 U.S. at 695. Not "would have been different"; just "a reasonable probability" that "the result of the proceeding would have been different." These are two vastly different standards.

Here, the Court of Appeals also cited, quoted, and apparently relied upon a pre-*Strickland* case, apparently applying that erroneous standard of review: "A tactical decision is ineffective only 'if it was so patently unreasonable that no competent attorney would have chosen it.' *Adams v. Wainwright,* 709 F.2d 1442, 1445 (11th Cir. 1983)." (App. 3-4) There was no other reason to cite and rely upon a pre-*Strickland* case with an impossible burden to meet. This alone was error because it set the tone for resolving the case under a "patently unreasonable" standard that went unsaid, but certainly appears to have been applied. This is completely contrary to *Strickland.*

2. Moreover, defense counsel has a constitutional duty to fully discuss the case with his or her client and discuss potential strategies with the client in making a reasoned determination of what issues to pursue. *See Strickland v. Washington,* 466 U.S. at 688[13]; *Florida v. Nixon,* 543 U.S. 175, 178 (2004); ABA STANDARDS, *The Defense Function* § 4-5.2 (3d ed. 1993).[14] Counsel's failures

---

[13] *Strickland* in this regard also recognizes "client-centered" representation. *See Strickland,* 466 U.S. at 691.

[14] Standard 4-5.2, Control and Direction of the Case

> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(Continued on following page)

to adhere to these standards of diligence and keeping the client informed to determine and effectuate the client's wishes constituted ineffective assistance of counsel.

3. In the case of a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"; *Hill v. Lockhart,* 474 U.S. at 59; or, in this case, having a suppression hearing and, if losing, a conditional guilty plea, a circumstance recognized by the District Court. 2006 WL 1155940, *8 (App. 25).[15]

(i) what pleas to enter;

(ii) whether to accept a plea agreement;

(iii) whether to waive jury trial;

(iv) whether to testify in his or her own behalf; and

(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

The ABA Standards are entitled to great weight in determining whether defense counsel was ineffective. Indeed, they have been relied upon by this Court several times: *see, e.g., Strickland*, 466 U.S. at 688; *Williams v. Taylor*, 528 U.S. 362, 396 (2000); *Roe v. Flores-Ortega*, 528 U.S. at 490-91; *Wiggins v. Smith*, 539 U.S. at 522, 524.

[15] *See* U.S.S.G. § 3E1.1 (acceptance of responsibility after conditional plea is permissible).

Petitioner more than satisfied his burden under *Hill* under an objective analysis. He was constantly communicating with counsel about filing and pursuing a suppression motion, right up to the eve of pleading guilty. His trial counsel had some information about the *Franks* issue, and his counsel twice more received information from the government via a *Brady* letter, once after the plea but before sentencing (which happened to Strauser's benefit because the *Strauser* court reconsidered the denial of the suppression motion and granted it after Strauser's plea), and once after sentencing. Nothing was done about it, even after the plea and sentencing, but *Strauser* proves that it could have been done after the plea.

In the case of a missed suppression motion, petitioner must show that representation objectively was unreasonable and

> the defendant must also prove that his Fourth Amendment claim is meritorious and that there is reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Thus, while respondent's defaulted claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values.

Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). If the suppression motion were fully and adversarially litigated as a Fourth Amendment suppression motion and not just in an ineffective assistance claim, there is a reasonable probability the District Court could have followed *Strauser* if the issue were adversarially litigated. The Court of Appeals, however, posited three Candyman cases, without any real analysis of their application, which it concluded

would control this case and deny petitioner any relief based solely on hindsight, contrary to the dictates of *Strickland* (citing *United States v. Shields,* 458 F.2d 269, 278-81 (3d Cir. 2006); *United States v. Froman,* 355 F.3d 882 (5th Cir. 2004); *United States v. Bailey,* 272 F. Supp. 2d 822, 824-25 (D. Neb. 2003) (App. 9)).

We do not know how the suppression motion in this case would be litigated because it never has been.

4. In the case of defense counsel's failures at a "critical stage" of the proceedings, prejudice is not presumed, but it is more likely satisfied.[16]

In *Roe v. Flores-Ortega,* this Court held that defense counsel's failure to file a notice of appeal was a denial of effective assistance of counsel and the denial of a right to appeal, and there was no inquiry into whether the appeal would be meritorious other than whether the appeal would be outright frivolous. *Id.,* 526 U.S. at 486. The same standard should be applied here, and there is no constitutional justification why it should not be.

When defense counsel defaults a suppression motion, the standard should be whether the suppression motion that was never pursued is frivolous. The fact that Strauser completely prevailed and the government dismissed shows that the *Franks* issue is hardly frivolous. Petitioner submits that *Roe* has tempered the result in *Kimmelman* to whether the defaulted motion was frivolous because

---

[16] "These decisions rely primarily on the nature of the suppression motion hearing, 'often . . . the most critical stage of a criminal proceeding.' [*United States v.*] *Criden*, 675 F.2d [550,] at 556 [(3d Cir. 1982)]." *United States v. Chagra*, 701 F.2d 354, 362 (5th Cir. 1983).

petitioner was denied a "critical stage" of his case: a suppression motion and hearing.

Here, the Court of Appeals and District Court searched the record for justification for sustaining the search even though a suppression motion had never been adversarially litigated. They took the post-conviction record, with 20-20 hindsight contrary to *Strickland*'s mandate, to determine the merits of a suppression motion that was at least arguable at the time, and apparently still is. *See* article cited in n. 1, *supra*.

Petitioner was entitled to have that suppression motion fully and fairly litigated and not brushed off by a lawyer not fully informed of the factual issues that were still coming in. When confronted with the oversight, he changed the subject. "What's done is done," but it was not for Strauser, and it should not have been for petitioner. Therefore, petitioner satisfied his burden under *Strickland* and *Hill*. He received constitutionally ineffective assistance before and after his guilty plea when the mistake could still be remedied.

B. Subjective beliefs of defense counsel are inappropriate under *Strickland* (or are they?), and there is a split in the circuits on this issue.

Strickland itself, relying on an objective standard, conceivably left open the possibility that subjective inquiries were pertinent to the ineffectiveness inquiry. *Cf. Strickland,* 466 U.S. at 691 ("inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's . . . decisions"), quoted in *Roe v. Flores-Ortega,* 526 U.S. at 487. This case gives the Court

the opportunity to explain what it meant in this dangling sentence in *Strickland.* Are subjective motivations and intents of defense counsel pertinent or not? If so, to what degree? This case gives the Court an opportunity to explain and clarify.

The District Court and the Court of Appeals in this case turned to defense counsel's uninformed thought processes and post-hoc validated them to justify the conclusion that the unlitigated suppression motion would lose in this case.

The Circuits are split on this issue:

1. Cases holding that a subjective view of counsel's thought processes are NOT permissible in an objective inquiry under *Strickland* are:

– *Cofske v. United States,* 290 F.3d 437, 444 (1st Cir. 2002) ("as long as counsel performed as a competent lawyer would, his or her detailed subjective reasoning is beside the point").

– *Bonin v. Calderon,* 59 F.3d 815, 838 (9th Cir. 1995), *cert. den.* 516 U.S. 1051 (1996) (the fact the attorney was on drugs during the representation is irrelevant if the representation was objectively reasonable).

– *Chandler v. United States,* 218 F.3d 1305, 1315 & n.16 (11th Cir. 2000) (en banc), *cert. den.* 531 U.S. 1204 (2001) (n.16: "To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy.").

– *See also Poole v. Estep,* 2006 WL 2788233 (D. Colo. Sept. 15, 2006), *certificate of appealability den. sub nom.*

Fogle v. Estep, 2007 WL 901920 (10th Cir. 2007) (defense counsel's personal intentions irrelevant).

2. Cases holding that the subjective views of counsel ARE relevant to ineffectiveness determination under *Strickland*:

– *Strouse v. Leonardo,* 928 F.2d 548, 553 (2d Cir. 1991) (*Strickland* "sets the standard for general ineffectiveness claims and contains an objective as well as a subjective component"); *Greiner v. Wells,* 417 F.3d 305, 320 & n.17 (2d Cir. 2005),[17] *cert. den. sub nom. Wells v. Ercole,* 126 S.Ct. 1363 (2006).

---

[17] Note 17 provides:

See, e.g., Terry Williams v. Taylor, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (concluding, based on evidence that trial counsel incorrectly believed that state law barred access to available records, that counsel's decision not to review those records could not have been strategic); *Pavel*, 261 F.3d at 217-19 & n. 11 (refusing to defer to an attorney's decision not to call a witness where the decision "was animated primarily by a desire to save himself labor" and therefore "was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic' and have been especially reluctant to disturb"); *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996) (refusing to extend the Strickland presumption of competence where "counsel [wa]s unconscious at critical times" because the Court could not depend on "the buried assumption in our Strickland cases . . . that counsel is present and conscious to exercise judgment, calculation and instinct, for better or worse"); *DeLuca*, 77 F.3d at 587-90 & n. 3 (finding that counsel performed deficiently by neglecting to pursue a particular defense, even though the decision not to pursue the defense could have been justified, because defense counsel's actual decision "was so hasty and based on so little, that in light of the obvious likely benefits that could be gained from the defense,

(Continued on following page)

– *Thomas v. Varner,* 428 F.3d 491, 499 & n.7 (3d Cir. 2005) ("inquiry into whether counsel had some strategy is permissible"), *cert. den. sub nom. Palakovich v. Thomas,* 127 S.Ct. 928 (2007).

– *Kitchen v. United States,* 227 F.3d 1014, 1020 (7th Cir. 2000) (inquiring into thought processes about failure to file a notice of appeal).

– *Bullock v. Carver,* 297 F.3d 1036, 1057 (10th Cir. 2002), *cert. den.* 537 U.S. 1093 (2002); *Sallahdin v. Mullin,* 380 F.3d 1242, 1253-54 (10th Cir. 2004), *cert. den.* 544 U.S. 1052 (2005).

3. As can be seen by the denials of certiorari, this issue has come before the Court before, but review has not yet been granted on this question.

---

his decision cannot be considered either a reasonable professional judgment or a reasoned strategic choice").

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

JOHN WESLEY HALL, JR.*
1311 Broadway
Little Rock, AR 72202
501-371-9131

**Counsel of Record*

ARTHUR MADDEN
MADDEN & SOTO
465 Dauphin Street
Mobile, AL 36602
251-432-0380

DAN JUENGEL
FRANK & JUENGEL
7777 Bonhomme Ave., Ste. 1601
St. Louis, MO 63105
314-725-7777

Attorneys for Petitioner

APPENDICES

Page

A *Davidson v. United States,* 213 Fed. Appx. 769 (11th Cir. 06-12705 CC, Jan. 4, 2007).....App. 1

B *United States v. Davidson*, CR02-00058-CB (S.D. Ala. May 1, 2006).....App. 8

C *United States v. Davidson,* 2006 WL 1155940 (S.D. Ala. May 1, 2006).....App. 9

D *United States v. Davidson*, CR02-00058-CB (S.D. Ala. June 12, 2006).....App. 36

E *Davidson v. United States,* 138 Fed. Appx. 238 (11th Cir. 04-14325, June 24, 2005).....App. 38

F *United States v. Davidson*, CR02-00058-CB (S.D. Ala. July 19, 2004).....App. 42

G *United States v. Davidson*, 360 F.3d 1374 (11th Cir. March 1, 2004).....App. 60

H *Davidson v. United States* (11th Cir. 06-12705 CC, Feb. 6, 2007) (denial of rehearing).....App. 65

APPENDIX A

213 Fed. Appx. 769

[DO NOT PUBLISH]

[FILED JAN. 4, 2007]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-12705

Non-Argument Calendar

D. C. Docket Nos. 03-00517-CV-CB & 02-00058 CR-CB

MICHAEL ADAM DAVIDSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court

for the Southern District of Alabama

Before ANDERSON, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Michael Adam Davidson was convicted on a guilty plea of one count of receiving child pornography, in violation of 18 U.S.C. § 2252A(a)(2). The government appealed his sentence, but we affirmed it. *United States v. Davidson,* 360 F.3d 1374 (11th Cir. 2004). Thereafter, Davidson filed a 28 U.S.C. § 2255 motion for relief from the judgment of conviction and sentence, which the district court denied. On appeal, we vacated that order and remanded for further proceedings, with instructions that the district court hold an evidentiary hearing and further consider the ineffective assistance of counsel claim. *Davidson v. United States,* 138 Fed. Appx. 238 (11th Cir. 2005). After doing so, the district court again issued an order denying relief. It is that post-remand order that Davidson has on appeal before us now. Because the parties and district court are familiar with the factual details and all of the procedural history of the case, we will not belabor them here.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that we review de novo. *Gomez-Diaz v. United States,* 433 F.3d 788, 790 (11th Cir. 2005). "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense," U.S. Const. amend. VI, and "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). To demonstrate ineffective assistance of counsel under Strickland, a petitioner "must show that counsel's performance was [constitutionally] deficient" (performance prong), *id.* at 687, 104 S.Ct. at 2064, and that the deficient performance prejudiced his defense (prejudice prong). *Id.*

To establish the deficient performance prong of the *Strickland* test, the petitioner must show, by a preponderance of the evidence, that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687, 104 S.Ct. at 2064; *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000). The proper measure of attorney performance is reasonableness under prevailing professional norms, *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065, and "the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled[,]" *Chandler,* 218 F.3d at 1313. In other words, "[t]he petitioner must establish that particular and identified acts or omissions of counsel were outside the wide range of professionally competent assistance." *Id.* at 1314 (quotation omitted).

In making the performance determination, the attorney's conduct must be evaluated from his perspective at the time in order to avoid the distorting effects of hindsight. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Judicial scrutiny of counsel's performance is highly deferential, and there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.* at 689, 104 S.Ct. at 2065. Given this strong presumption in favor of competence, "the petitioner's burden of persuasion – though the presumption is not insurmountable – is a heavy one." *Chandler,* 218 F.3d at 1314. Additionally, when the performance of an experienced trial counsel is at issue, the presumption in favor of the reasonableness of counsel's performance is even stronger. *Id.* at 1316. A tactical decision is ineffective only "if it was so patently unreasonable that no competent

attorney would have chosen it." *Adams v. Wainwright,* 709 F.2d 1443, 1445 (11th Cir.1983).

In remanding this case to the district court, we did not make a determination about the professional reasonableness of Horne's challenged conduct. Instead, we instructed the district court to hold an evidentiary hearing and determine whether Horne had communicated to Davidson "all the information he had (and reasonably should have had) bearing on the search warrant issue," and whether Horne "gave reasonable advice concerning that issue." *Davidson,* 138 Fed.Appx. at 239. If the district court found that Davidson either had not communicated all the information that he reasonably should have had or had not given reasonable advice, we instructed the district court to then determine "whether Davidson would have pleaded guilty but for the ineffective assistance." *Id.*

On remand, the district court held an evidentiary hearing and found that Davidson presented "strong evidence" that he initially had wanted to file a motion to suppress. The district court also found that Davidson agreed to forego the motion and pleaded guilty after Horne counseled him that a motion to suppress probably would be unsuccessful.

Davidson contends that the district court erroneously found Horne's performance was not constitutionally deficient. He points to a fax cover letter, sent on September 27, 2002, in which the government asked Horne to confirm that he had received two earlier letters regarding problems with the search warrant affidavit. At the time Horne received the fax, he had received only one letter from the government. Davidson argues that Horne's failure to immediately investigate the contents of the

second letter mentioned in the fax cover sheet, together with his failure to tell Davidson that a second letter existed and his failure to contact Yahoo about the email options available to the Candyman Egroup, rendered Horne's assistance constitutionally deficient. Davidson contends that he would not have pleaded guilty but for Horne's ineffective assistance.

We agree with the district court that Davidson has failed to establish his entitlement to relief. The evidence shows that Horne, an experienced defense attorney, considered the relevant case law, evaluated the search warrant affidavit, and communicated to Davidson his considered opinion that even if the FBI agent had knowingly included false statements in the affidavit a suppression motion probably would prove fruitless under *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Nothing in the contents of the second letter mentioned in the September 27, 2002 fax cover letter would affect that considered opinion, which already presumed that the statements of the FBI agent that were in question would be redacted from affidavit. Horne had already taken as a given that those statements were false and that the agent either knew that they were false or recklessly disregarded the possibility. The conclusion that Horne's advice rested upon – that the warrant would be upheld even after the statements in question were fully redacted – was not affected by the contents of the second letter. Nor could Davidson's decision to plead guilty have been, because he did so after considering Horne's opinion that the statements in question were made with knowledge of their falsity or with reckless disregard of it and for that reason would be redacted from the affidavit.

Horne's failure to file a motion to suppress was not professionally unreasonable. Even after all the false statements were redacted from it, the affidavit still contained sufficient information to establish probable cause to search Davidson's computer. Davidson had subscribed to and un-subscribed from the Candyman Egroup – a group created for the sole purpose of exchanging child pornography – six times in less than two weeks. In light of the information particular to Davidson in the affidavit, Davidson's reliance on *United States v. Strauser,* 247 F.Supp.2d 1135 (E.D. Mo. 2003), is misplaced. In that case the defendant joined the Candyman Egroup only once. *Id.* at 1144. The court there found that the defendant could have had benign motives for subscribing to the group and may never have participated in the group's activities after joining. *Id.* By contrast Davidson had joined the group six times. One time may be accidental, unintentional, or unknowing; six times are not. Given the statements that remained in the affidavit after redaction that explain the nature of the website and the habits of individuals who collect child pornography, any motion to suppress would have failed. Other courts have reached the same conclusion about the same template affidavit involved in this case that Horne reached when he decided not to file a motion to suppress. *See, e.g., United States v. Shields,* 458 F.3d 269, 278-81 (3d Cir. 2006); *United States v. Froman,* 355 F.3d 882 (5th Cir. 2004); *United States v. Bailey,* 272 F.Supp.2d 822, 824-25 (D.Neb. 2003).

It is not as though Davidson got nothing in return for his guilty plea. He was spared prosecution on four of the five counts against him. Davidson knew the affidavit had problems when he agreed to plead guilty, but after listening to his attorney's reasonable advice on the likely

outcome of a motion to suppress, he decided to plead guilty anyway.

We cannot say that Horne was "constitutionally compelled" to file a motion to suppress before advising Davidson about pleading guilty. *See Chandler,* 218 F.3d at 1313. Additional evidence brought forth after Davidson's plea, such as the CD issued by the government five months after his guilty plea, cannot render the Horne's earlier performance unreasonable. To conclude otherwise would require us to use the type of hindsight forbidden by *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 02-00058-CB
v.	)	
MICHAEL ADAM DAVIDSON,	)	CIVIL ACTION NO. 03-0517-CB
Defendant/Petitioner.	)	

JUDGMENT

Pursuant to separate order entered this date, it is **ORDERED, ADJUDGED** and **DECREED** that the motion to vacate, set aside or correct sentence filed in the above-styled action be and hereby **DENIED.**

DONE this the 1st day of May, 2006.

s/ Charles R. Butler, Jr.
Senior United States District Judge

APPENDIX C

2006 WL 1155940

[FILED MAY 1, 2006]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	CRIMINAL NO.
v.	)	02-00058-CB
MICHAEL ADAM DAVIDSON,	)	CIVIL ACTION NO.
Defendant/Petitioner.	)	03-0517-CB

OPINION and ORDER

This matter is before the Court on mandate from the United States Court of Appeals for the Eleventh Circuit vacating the Court's order denying petitioner's § 2255 motion. The appellate court held that this Court erred in its analysis of petitioner's claim of ineffective assistance of counsel in connection with his guilty plea and remanded the case for further proceedings. After an evidentiary hearing conducted on December 12, 2005, the Court concludes that the motion is due to be denied.

Facts

I. The FBI's Candyman Investigation

A. The Egroup & The Search Warrant Affidavit

As discussed in the Court's prior § 2255 order, petitioner Michael Adam Davidson is one of a number of people nationwide who were convicted of possession or receipt of child pornography as a result of the FBI's investigation of a

short-lived internet website known as "Candyman." The following facts related to the FBI's investigation of the Candyman internet group were set forth by the Fifth Circuit in *United States v. Froman,* 355 F.3d 882 (5th Cir. 2004) and are relevant here:

> On December 6, 2000 pornographer Mark Bates ("Bates") founded an online club called The Candyman Group ("The Group" or "Candyman") using a free internet service called eGroups. In general, internet groups, like those available through eGroups, allow individuals with similar interests to band together and share information through the world wide web. Members of these groups are empowered to share interests, talents, and knowledge. Candyman did not have such a benign purpose. The singular goal of the Group was to collect and distribute child pornography and sexually explicit images of children.
>
> All Egroups are organized into different categories according to interest. Candyman was categorized as an adult, transgender, image gallery, at once suggesting its sexual content. The main web page announced to anyone considering joining the Group its purpose:
>
> > This group is for People who love kids. You can post any type of messages you like too [sic] or any type of pics and vids you like too [sic].
> >
> > P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.
>
> After reviewing the web page and learning the group's mission, anyone who wished to join the Group could do so either by clicking the subscribe link on the main web page or by sending

an e-mail to the group administrator. Those subscribing via the website subscribe link were presented with e-mail delivery options allowing them to choose whether to receive all e-mails addressed to the group as a whole, receive a daily digest of e-mails addressed to the group, or to receive no e-mails and simply review the messages on the website where they are archived. Members who joined via e-mail were sent a confirmation e-mail welcoming the new member to the group but would not necessarily be presented with e-mail delivery options. Subscription to Candyman was free of charge, and simple directions for revoking membership were provided at the bottom of all correspondence. Additionally, both a link and an e-mail address on the Group's main web page could be used to cancel membership.

Once a new member subscribed, he had full access to the website and all of its functions. Members could post electronic pictures and video clips to the website for other members to access and download. They could use the chat feature to converse with each other in real time. Members could use the group to disperse images, videos and text via e-mail. Each message addressed to the group was sent to all members who requested e-mail delivery and was also stored on the website for members to review at their convenience. E-mails were also sent by the Group to members notifying them of new files that had been posted to the site and at times giving a brief description of the pornography. A poll page was included on the website that allowed group members to vote on matters important to them. Candyman members voted on the types of images they preferred: "What you all like to see more boys or girls and

whats age and more actions or more soft pics pick as many as need. [sic]." Finally, a "links" page provided links to other webpages and other online groups that supplied child pornography.

* * * *

The investigation of the Candyman Group began in early January 2001, when Special Agent Geoffrey Binney ("Agent Binney"), acting undercover, joined the Group. After subscribing, Binney began receiving all of the e-mails that were addressed to the Group by other members, many of which contained child pornography. From the time Agent Binney joined until the Group was shut down, he received almost 500 e-mails, containing almost 300 images of child pornography or child erotica. Agent Binney further monitored the files uploaded to the website, and captured approximately 100 illegal images and video clips.

In mid January 2001, Agent Binney contacted Yahoo!, identified himself as an FBI agent, and probed for information on the group and its members. The representative from Yahoo! refused to answer Agent Binney's questions. Given the fruitless inquiries on January 19, 2001, Agent Binney obtained a subpoena directing Yahoo! to divulge any identifying information regarding members. Yahoo! responded to the subpoena on February 6, 2001. It shut down the site and provided Agent Binney with a list of approximately 3400 e-mail addresses of individuals who were Group members when Candyman was shut down. The list provided no indication that e-mail delivery options were available to members.

> Agent Binney and the FBI sorted the 3400 e-mail addresses in the member list by e-mail address providers, and sent grand jury subpoenas to those providers, requesting Group members' names, addresses, phone numbers, and any other identifying information. Once the FBI obtained addresses from service providers, Group members were assigned to local FBI offices for further investigation. Agent Binney provided local offices with template search warrant affidavits which contained all of the basic information that had been collected in the investigation. Local agents could simply fill the gaps in the affidavit with the suspect specific information and present that affidavit to a magistrate to obtain a warrant.

Id. at 885-86 (footnotes omitted).

B. Problems with the Template Search Warrant Affidavit

In May 2002, after numerous searches and arrests based on the template affidavit provided by Agent Binney, the government learned that an important allegation in the search warrant affidavits might not be true. The affidavit alleged that "[e]very email sent to the group was sent to every member [of the Candyman Group] automatically" when, in fact, group members who joined via the website were given the option to decline the automatic email feature. In June 2002, the government confirmed that the "no email" option existed, so that all members of the group did not necessarily get all emails. The import of this information was that the pictures and videos of child pornography received by Agent Binney while he was a member of the group were not necessarily emailed to every member of the group. Nonetheless, all members of the

group had access to the pictures and videos on the group's website.

In various proceedings after the existence of the "no email" option was discovered, including *United States v. Strauser* in the Eastern District of Missouri, Agent Binney testified that he joined the Candyman Group via email, rather than the website, and therefore, would not have seen the "no email" option when he joined. After Binney's testimony in *Strauser* and before petitioner plead guilty, the FBI, through its own internal investigation, discovered that Yahoo records contradicted Agent Binney's claim that he joined via email. According to computer source codes located at Yahoo headquarters, the email account assigned to Binney subscribed via the Candyman website and, therefore, would have been confronted with the "no email" option.

II. The Investigation and Arrest of Petitioner Michael Adam Davidson

The search warrant affidavit in this case, which was signed by Special Agent Tracy Lollis and is based on the template affidavit provided by Agent Binney, contained the misstatement regarding the automatic email feature, i.e., that "all new members of the Egroup were immediately added to the Candyman e-mail list[ ]" and that "[e]very e-mail sent to the group was distributed to every member automatically." But the affidavit also contained extensive information about the nature and purpose of the Candyman website, in general. For instance, the affidavit stated:

> Website Features: The Candyman website had several different features. First, the "Files" section provided an area for members to post

> images or video files for others to download. . . . The "Polls" section allowed the group members to engage in survey activity, e.g., asking "what age group do you prefer?" The "Links" section allowed members to post the URL's for new websites containing similar content. Lastly, the "Chat" section allowed users to engage in real-time conversations among themselves.
>
> Images Posted on the Website: The primary feature of the Candyman Egroup's website was the "Files" section. This allowed members to upload and download images directly to and from the website. SA Binney was a member of the Egroup from January 2, 2001 until February 6, 2001 when Yahoo! closed down the Egroup. During that time, SA Binney captured approximately 100 images and video clips [containing child pornography] that had been uploaded to the website.

Furthermore, the affidavit related the purpose of the group, as stated on the website's main page (also quoted in *Froman, supra* p. 2), that the site is for people who "love kids" to post "any type" of pictures or videos they like.

With respect to the petitioner, Michael Adam Davidson, the search warrant affidavit alleges that Yahoo's records revealed the email address looptone@aol.com was listed as a member of the Candyman egroup and that the email address belonged to Michael Adam Davidson, at the street address listed on the search warrant. According to the affidavit, looptone@aol.com (Davidson's email address) subscribed and unsubscribed to the Candyman Group six times between January 22, 2001 and February 2, 2001.

In addition to the information about the Candyman website and petitioner's connection to that website, the affidavit also contained general information about the

traits and characteristics of persons who collect child pornography, which was provided by Supervisory Special Agent James Clemente, an FBI behavioral analyst who specializes in "child exploitation cases." Among the observations offered by SSA Clemente: Such persons "receive sexual gratification and satisfaction from sexual fantasies fueled by depictions of children that are sexual in nature" and also use child pornography as a means of understanding and justifying their feelings. These individuals tend to seek out like-minded people either in person or on the internet, in part, to rationalize or justify their own deviant behavior. And, they "rarely, if ever, dispose of their sexually explicit materials" which they "almost always maintain in . . . their homes or other secure location." (Search Warrant Aff. pp. 10-11.)

On March 19, 2002, using the search warrant affidavit described above, the local FBI office obtained a search warrant for petitioner's residence. A computer diskette containing images of child pornography was found in the residence, and petitioner was arrested.

III. Events Leading to Petitioner's Guilty Plea

Petitioner's father retained local attorneys Richard Horne and James Dailey to represent petitioner immediately after he was arrested.[1] After a detention hearing, the

[1] Horne and Dailey were partners at that time. Horne was lead counsel, assisted by Dailey. Mr. Horne has been in practice since 1976 and has extensive experience in the field of criminal defense. Horne testified that his practice has evolved over the years from about 95% criminal and 5% civil to 50% of each. Horne testified that he has a "fair amount" of experience in federal court as well as a "fair amount" of experience handling "white collar" cases. Horne is a member and past

(Continued on following page)

magistrate judge entered an order releasing petitioner on home confinement, and petitioner returned to Illinois with his parents while awaiting trial. Upon return to Illinois, petitioner began to undergo psychiatric treatment, spending two weeks in inpatient treatment before being released to his parents' custody. Because of the treatment, petitioner's counsel requested, and obtained, a delay in the criminal proceedings.[2] Arraignment was delayed until August 7, 2002, and his trial was scheduled for the October 2002 trial term with jury selection to commence on September 30, 2002.

With the goal of keeping petitioner from serving any jail time, petitioner's attorneys began to explore three possible defenses, which they discussed with petitioner and his parents in a meeting in Illinois on May 30, 2002. The first was pleading not guilty by reason of insanity. Mr. Horne suggested the insanity defense was a possibility because petitioner had previously been diagnosed with obsessive-compulsive disorder. Horne did not explain, however, that an insanity verdict would result in petitioner being committed to a hospital-based prison facility. The second defense under consideration was a motion to suppress the evidence obtained in the search. The third possible defense was that the images of child pornography found in the search of petitioner's apartment were virtual, as opposed to actual, images. Thus, when Horne and

---

president of the Alabama Defense Lawyers Association. He is also a member of the National Criminal Defense Lawyers Association.

[2] Mr. Horne and Mr. Dailey erroneously believed that petitioner would receive jail credit for time served on home confinement. Therefore, they explained to petitioner that their strategy was to delay the trial as long as possible. Not until a few weeks prior to the scheduled trial date did Mr. Horne correct this mistake.

Dailey left Illinois, petitioner believed that they were preparing an insanity defense, preparing a motion to suppress and looking into a virtual-images defense.

While on pretrial release, petitioner devoted much of his time to assisting with preparation for his defense, especially the motion to suppress evidence obtained in the search. Petitioner was much more knowledgeable than Mr. Horne about matters related to email and the internet.[3] Petitioner had been aware since the preliminary hearing that the government's information about the Candyman emails was wrong. When Agent Lollis testified at that hearing that all members of the group received all Candyman emails, petitioner pointed out to Dailey, and later to both Dailey and Horne, that receipt of emails was not possible because petitioner always selected the "no email" option when he signed up for an egroup. On July 25, 2002, petitioner's father faxed Horne and Dailey a copy of an article that had appeared on that date in the St. Louis Post Dispatch. The article reported on a St. Louis case, *United States v. Gregory Strauser,* in which the United States had admitted, for the first time, the factual error in the Candyman template affidavit. Counsel did not respond to the first fax, so at petitioner's request his father faxed the article a second time on July 28, 2002. Eventually, Horne called petitioner about the article and told him he would definitely be filing a motion to suppress.

Meanwhile, in a July 16, 2002 letter addressed to Jim Dailey, Assistant United States Attorney Maria Murphy, informed defense counsel of the inaccuracy in the search

---

[3] Mr. Horne testified that he rarely even used email at the time he was handling petitioner's case.

warrant affidavit regarding the automatic email feature. The letter explained that subscribers to the Candyman Group had the option to receive no emails. In addition, the letter provided Agent Binney's explanation for the misstatement, that is, that Binney never saw the "no email" option because he joined the Group via email, where the option was not available, rather than via website, where it was.

When petitioner came to Mobile for arraignment in early August 2002, Horne provided him with a search warrant affidavit to review. Petitioner returned to Illinois and thoroughly analyzed the affidavit.[4] On August 12, 2005, petitioner sent a counsel his analysis "so that [Horne] [could] better understand how the factual inaccuracies in the warrant relate to Yahoo groups" and would "have a better understanding of the workings of Yahoo groups before writing the motion to suppress." (Petr.'s Ex. F.) Petitioner went through the affidavit and highlighted "the salient information in each [paragraph]" and "wr[ote] a narrative of all the factual inaccuracies in the search warrant." (*Id.*) In his analysis, petitioner pointed out repeatedly that the affidavit was wrong when it stated that all group members automatically received Candyman emails. Specifically, petitioner stated that "e-mails posted to the group are NOT automatically disseminated to all the members," that he "ALWAYS clicked on the option to not receive e-mail" and "that this option to not receive

[4] It turns out that the government had provided the wrong search warrant and affidavit to defense counsel in discovery. Consequently, petitioner reviewed an affidavit and warrant from a Candyman investigation of another individual. The personal information was wrong, but the generic Candyman information was the same as contained in the affidavit used to obtain the search warrant for petitioner's residence.

e-mails is asked of the individual wishing to join the Yahoo group in a plain as day fashion[;] no special searching is required." (Petr.'s Ex. G.)

On August 15, 2002, petitioner sent Horne a follow-up letter by fax inquiring whether he had received the foregoing analysis. In the subsequent letter, petitioner again emphasized the inaccuracies he found in the affidavit:

> I really would like you to read my thoughts on the search warrant, which is the subject matter of the package. I believe I have a good insight into the operation of Egroups, and I just want to make sure that you and Jim realize all the inaccuracies that I saw. . . . [W]ith regard to the letter sent out by Maria Murphy in response to the search issue, it appears to me that they are justifying their affidavit based on [Binney's] not noticing that he could elect to not receive emails and that Yahoo! never told them about that fact either. Perhaps this is to prove that the FBI acted "in good faith." This is utter nonsense because on Egroups right after you clicked on "Join", a screen came up asking how you would like to deal with the emails . . . it would have been impossible not to have seen this. . . . On page 3 of Murphy's letter, in the notation at the bottom, they admit that, "On June 25, 2002, Yahoo! provided the FBI with a disk containing the records of certain CANDYMAN Egroup members, though not all, indicating such members had e-mail delivery options and the option each member chose." Can we not have access to this information to prove that I was not one who elected to receive emails in order to bolster our case?

(Petr.'s Ex. L.)

Petitioner was diligent in pursuing the search warrant issue with his attorneys. Petitioner faxed Horne and Dailey letters on August 22, August 27 and September 3. The August 22nd letter begins:

> Guess who is sending you yet another fax? I hesitated, but in the end, I decided it is my life, after[ ] all. I guarantee that no one has thought this search warrant thing through more than me. I am no lawyer, but I do know the difference between fact and fiction, and I want you all to be aware of these findings.
>
> . . . .
>
> . . . [L]ets [sic] throw all of that false information out. The new affidavit reads: Mr. Young joined a group called CANDYMAN at 9:23 AM on January 5, 2001. He clicked on the join button and was automatically allowed to be a member of the group. Since he clicked on the "Read on the Web" only option, he received no emails from the group. There was a file section containing child pornography, but Yahoo! could not provide us with information telling us if Mr. Young had downloaded any of those files.

(Petr.'s Ex N.) The primary focus of the two subsequent letters is the difference between receiving and possessing child pornography, although the letters mention the "email problem in the [search warrant] affidavit" and the "search affidavit debacle."

Meanwhile, counsel also pursued matters related to the motion to suppress. In a letter dated July 30, 2002,

Horne contacted St. Louis attorney Daniel Juengel,[5] who represented Strauser in the Eastern District of Missouri, the case reported in the St. Louis Post Dispatch. Horne enclosed a copy of the search warrant affidavit from petitioner's case and requested copies of the *Strauser* motion to suppress and supporting brief and also requested information about the Yahoo representative who testified in *Strauser*. (Petr.Ex.EE.) On August 19, 2002, Horne filed a motion to extend the deadline for filing pretrial motions, stating that "there are two additional pre-trial motions . . . that the defendant intends to file" including a "Motion to Suppress the search of the residence of the defendant." (Doc. 17.)

Mr. Juengel responded by letter dated September 18, 2002, with copies of the relevant orders, pleadings and evidence from the *Strauser* case. At the time, Judge Perry was the only judge to have addressed the Candyman suppression issue. Her ruling in *Strauser* was significant in three respects. First, she found to be false Special Agent Binney's statement that all members of the Candyman egroup automatically received emails. Second, she found that without that statement the affidavit lacked probable cause to support the search warrant in that case. Third, she concluded that the evidence was nonetheless admissible under the good faith exception to the exclusionary rule because Binney joined the Candyman group by email and, therefore, would not have seen the "no email" option available to those who joined via the website.[6]

---

[5] Mr. Juengel now represents petitioner in the § 2255 motion *sub judice*.

[6] At the time of the initial suppression hearing in *Strauser*, Binney's testimony that he signed up via email was not contradicted by

(Continued on following page)

Around the time of Juengle's letter, the government sent a second *Brady* letter, dated September 16, 2002, to Mr. Horne with information that contradicted the most crucial aspect of Binney's testimony before Judge Perry. That information was this – according to Yahoo logs, made available after the *Strauser* ruling, Binney subscribed via web, not via email as he had testified. Thus, Binney would have been confronted with the "no email" option and knew, or should have known, that the Candyman emails were not automatically sent to all subscribers. Mr. Horne did not receive the letter, however, until October 9, 2002, nine days after petitioner's guilty plea.[7]

Yahoo witnesses. Subsequently, however, the FBI's Cyber Unit launched its own investigation into the matter and, after the FBI traveled to Yahoo headquarters and examined the source codes for Binney's subscription to the Candyman egroup, both the FBI and Yahoo concluded that Binney signed up via internet. *United States v. Strauser*, 247 F. Supp. 2d 1135, 1139 (E.D. Mo. 2003). On a motion to reconsider, decided after the petitioner pled guilty in the instant case, Judge Perry found that Binney would have been confronted with the "no email" option when he signed up for Candyman and that he acted with reckless disregard for the truth when he stated in the search warrant affidavit that all Candyman members received all emails. She therefore granted the motion to suppress.

[7] The September 16th was addressed to Mr. Horne at "182 St. Francis Street." Mr. Horne testified that his mailing address at that time was a post office box, not his physical office address. Horne's testimony that he did not receive the letter until after the guilty plea is bolstered by the letter itself. (Petr.'s Ex. Q.) The letter from Mr. Horne's files bears a "received" stamp dated October 7, 2002 from the sender, the United States Attorney's Office. The letter was also date stamped as received by Horne's office on October 9, 2002. Thus, the most logical explanation, and the Court so finds, is that the letter was first sent to Horne's street address, returned to the United States Attorney's office on October 7 and re-sent and finally received by Horne's office on October 9.

On September 18, 2002, petitioner returned to Mobile for arraignment on a superseding indictment. After the arraignment, Horne told petitioner that he should begin thinking about pleading guilty. Because of the charges in the superseding indictment, petitioner's chat room transcripts were likely to be admitted into evidence, and Horne believed those transcripts would make it highly unlikely for a jury to find petitioner not guilty by reason of insanity.[8] Petitioner was furious and asked about the motion to suppress. Horne responded that motions to suppress were hard to win and that the Fourth Amendment had withered on the vine. Petitioner was not ready to give up, however, without a suppression motion. Horne told him that he would come to Illinois in a few days to talk about things.

Horne went to Illinois on September 21, 2002 to discuss with petitioner the possibility of a guilty plea. Horne knew that the defense in *Strauser* had won on probable cause and lost on good faith. He did not think that petitioner had even a chance of winning a suppression motion. Petitioner, who was still focusing on the search warrant issue, asked, "Where's our motion to suppress at?" (Tr. 72.) Instead of a motion to suppress, Horne brought with him copies of unfavorable rulings from the *Strauser* case. Petitioner was very reluctant to give up on the suppression motion. Horne told him, however, that it was a "dead issue." (Tr. 72.) At that time Horne "thought that the chances of prevailing [on a motion

---

[8] On petitioner's computer, agents found saved dialogue from internet "chats" between petitioner and others. These internet conversations included detailed discussions of torturing, mutilating and murdering children. When some of the correspondents described how they had actually tortured and murdered children, petitioner expressed an interest in doing the same. (Presentence Investigation Report ¶ 43.)

to suppress], given everything in the indictment and everything in the search warrant and the affidavit, and also based on the history [of *Strauser*] [,] . . . [were] so unlikely" that it was not worth filing a motion to suppress. (Tr. 186.) Not only did Horne discuss the *Strauser* ruling with petitioner, he also explained to petitioner *Franks v. Delaware* and related case law. Horne testified:

> I discussed with him the kind of genesis starting with *Aguilar* [*v.*] *Spenelly* [sic] and coming forward with *Gates* and *Franks* and *Leon,* and all of those, and what I described as, in my opinion, how horrible the standard was in that intentional misrepresentations could be made, but if you backed those out and then you backed out those that were wrong, . . . there would still be sufficient information within the affidavit to carry the ball to justify the search.

(Tr. 211.) Horne did not discuss with petitioner a conditional plea that might have allowed him to have the suppression issue ruled on but preserved for appeal, nor did he discuss the possibility of pleading not guilty and litigating the motion to suppress. Following counsel's advice, petitioner reluctantly decided to plead guilty.

In the process of finalizing plea negotiations, AUSA Murphy sent Mr. Horne an undated letter by fax that made reference to the September 16th *Brady* letter as follows:

> I also wanted to confirm that you had received both letters informing you of potential issues concerning S.A. Binney's affidavit for the search warrant and the subsequent testimony at a *Franks v. Delaware* hearing in the Eastern

> District of Missouri and a suppression hearing in the Southern District of Texas.

(Petr.'s Ex. DD, emphasis added.) Although Mr. Horne had no independent recollection of receiving this undated letter, he testified that it is likely he got it because he did receive another fax from Ms. Murphy's secretary (Petr.'s Ex. FF) that appears to be a cover letter written to accompany the undated letter.[9]

On September 30, 2002, the date set for jury selection, Davidson entered a plea of guilty to Count One of the Superseding Indictment, which charged him with receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1). The remaining substantive charges were dismissed as part of a plea agreement.[10] During the guilty plea colloquy, petitioner was asked whether he was satisfied with his attorney and whether he was satisfied with his attorney's advice. Petitioner answered both questions affirmatively.

When he returned to Mobile to prepare for sentencing, petitioner found the September 16th *Brady* letter from Maria Murphy in Horne's files. Petitioner was furious with his attorneys. Mr. Horne would not discuss the letter. Instead, he insisted to the petitioner that his focus should be on sentencing.

At the sentencing hearing on January 29, 2003, petitioner was sentenced to a term of imprisonment of 33

---

[9] Most likely this correspondence was faxed on September 27, 2002.

[10] Petitioner also confessed to the allegations of the two forfeiture counts and agreed to the forfeiture of certain property seized by the FBI.

months.[11] The petitioner did not file an appeal. The government, however, appealed the sentence, asserting that the Court should have applied the sentencing guidelines provision applicable to trafficking in child pornography rather than the provision applicable to possession of child pornography. The sentence was affirmed on appeal. Petitioner has served the sentence of imprisonment imposed upon him but remains under a supervised release term.

II.* Procedural History/Section 2255 Motion

Petitioner filed the instant motion to vacate, set aside or correct sentence on August 8, 2003. This Court denied the motion without an evidentiary hearing by order dated July 20, 2004. Petitioner filed a notice of appeal, and this Court granted a certificate of appealability. The Eleventh Circuit reversed on one issue – whether petitioner's counsel rendered constitutionally ineffective assistance of counsel in connection with the guilty plea and "his advice involving the search warrant issues." *Davidson v. United States,* No. 04-14325 (11th Cir. June 24, 2005) (per curiam) (slip op.). The opinion found that this Court had incorrectly analyzed the prejudice prong of petitioner's claim that his guilty plea was the result of constitutionally

[11] On April 1, 2003, the government provided petitioner's counsel with a CDRom containing 50 documents related to the Binney email issue. Those documents – which include court orders, testimony, statements, correspondence and other documents – appear to track the history of the investigation, discovery and repercussions of the false statements in Binney's template affidavit. After receiving this information, counsel filed a motion seeking to delay petitioner's incarceration, which was denied.

* [So in original; should be IV.]

ineffective assistance of counsel under *Hill v. Lockhart,* 474 U.S. 52 (1985):

> . . . The district court rejected this claim based on its view that a motion to suppress the evidence obtained from the search would have failed under the test set out in *Franks v. Delaware,* 438 U.S. 154 (1978). That is not, however, the test for the prejudice prong of an ineffective assistance of counsel claim relating to the entry of a guilty plea. Instead, the prejudice inquiry is focused on whether, if counsel had not performed ineffectively, Davidson still would have pleaded guilty.
>
> It may be that before Davidson pleaded guilty counsel communicated to him all of the information counsel had (and reasonably should have had) bearing on the search warrant issue, and gave Davidson reasonable advice concerning that issue. If counsel did that, the ineffective assistance of counsel claim fails on the performance prong. However, if counsel did not perform within the wide range of reasonable professional assistance, under the *Hill* decision this claim will turn on whether Davidson would have pleaded not guilty but for the ineffective assistance. Both of those issues should be addressed in an evidentiary hearing.

Davidson, slip op. at 3-4.

III.* Analysis

A. Legal Standard-Constitutionally Ineffective Assistance of Counsel

To establish that counsel's performance was so deficient as to violate petitioner's right to counsel guaranteed by the Sixth Amendment, petitioner "must show both incompetence and prejudice: (1) [P]etitioner must show that counsel's representation fell below an objective standard of reasonableness and (2) [P]etitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Chandler v. United States,* 218 F.3d 1305, 1312-13 (11th Cir. 2000) (en banc) (internal quotations and citations omitted). The standard for the first prong is reasonableness under the prevailing norms of the legal profession. *Id.* at 1313. In the context of guilty pleas, the second prong – the "prejudice" requirement – is satisfied if the petitioner "show[s] that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

B. Discussion

After carefully considering all of the evidence presented at the hearing, the Court has concluded that this case does, indeed, turn on the performance prong of the analysis.[12] In evaluating the reasonableness of counsel's

---

* [So in original; should be V.]

[12] Since the Court has concluded that counsel's advice was not erroneous, the question of prejudice, *i.e.*, whether petitioner would not have pled guilty but for counsel's "erroneous" advice, is moot. However,

(Continued on following page)

performance, the question is not whether counsel did what was possible, or even what was prudent but whether he did what was "constitutionally compelled." *Chandler,* 218 F .3d at 1313. The burden of persuasion is on the petitioner to prove by a preponderance of competent evidence that counsel's performance was unreasonable. *Id.* "[T]o show that [counsel's] conduct was unreasonable, a petitioner must establish that no reasonable counsel would have taken the action that his counsel did." *Id.* at 1315. Review of counsel's performance must be highly deferential, and there is a "strong presumption" of reasonableness. *Id.* at 1314. That presumption is even stronger if petitioner was represented by experienced trial counsel. *Id.* at 1315. Nothing looks the same in hindsight; therefore, the Court must evaluate the reasonableness of counsel's performance from counsel's perspective at trial. *Id.* at 1316. No absolute rules dictate what is reasonable. *Id.* at 1317. Hence, counsel has no absolute duty to investigate particular facts or a certain line of defense. *Id.*

In this case, whether counsel's advice to plead guilty was unreasonable hinges on whether counsel unreasonably advised petitioner that a motion to suppress would not likely succeed. Counsel's legal conclusion that a suppression motion would not be fruitful must be evaluated for reasonableness under the circumstances. "Failure to file a motion to suppress does not constitute per se ineffective assistance of counsel . . . Defense counsel 'is not required

---

petitioner did present persuasive evidence that he strongly wished to pursue the suppression issue and only decided to abandoned that issue and plead guilty after being persuaded by counsel that a suppression motion had no chance of succeeding. If counsel's advice had been erroneous, petitioner would succeed on the prejudice prong.

automatically to file a suppression motion in every case involving evidence or statements obtained after a search; rather, counsel must use 'professional discretion in deciding whether there are sufficient grounds' for such a motion." *United States v. Chavez-Valencia,* 116 F.3d 127, 134 (5th Cir. 1997) (quoting *United States v. Aulet,* 618 F.2d 182, 187-88 (2d Cir. 1980). Counsel's decision whether to file a suppression motion required an analysis of the search warrant affidavit under the Supreme Court's decisions in *United States v. Leon,* 468 U.S. 897 (1984) and *Franks v. Delaware,* 438 U.S. 154. Collectively, those cases hold that evidence seized pursuant to a search warrant obtained by false statements is admissible if the false statements were made in good faith, *Leon,* at 912, but if the false statements were deliberately or recklessly made, the evidence must be excluded unless the search warrant affidavit contained sufficient probable cause without the false statements. *Franks,* at 171-72.[13]

Petitioner first contends that counsel failed to discover or appreciate the impact of evidence that, in effect, would have led a reasonable attorney to file a motion to suppress under *Leon.* The government's September 16th letter – informing defense counsel that Binney did not join Candyman via email as he had testified in *Strauser* – was sufficient to put counsel on notice that the *Leon* good faith

[13] Actually, this statement of the application *Franks* and *Leon* is in reverse order, but this is the sequence in which the ineffective assistance claims have been raised. *Leon* applies only when the affidavit is found to lack probable cause, so the first question is whether the search warrant affidavit supported a finding of probable cause. *See, e.g., United States v. Foree,* 43 F.3d 1572, 1575 n. 7 (11th Cir. 1995) (declining to address government's reliance on *Leon* good faith exception where affidavit supported probable cause finding).

exception did not apply. Horne did not receive the September 16th letter;[14] however, he should have known about it. A subsequent letter (Exhibit DD) faxed to Horne prior to the guilty plea referred to two previous letters from the United States Attorney regarding Binney and the search warrant affidavit.[15] Mr. Horne only had one. For the government to admit error in a search warrant affidavit is an exceptional circumstance; for the government to provide two letters on the issue is extraordinary. Consequently, any reasonable attorney in Mr. Horne's situation would have made further inquiry to find the letter he did not have and would have discovered evidence of deliberate or reckless falsehood in the search warrant affidavit. But the evaluation of a search warrant affidavit for possible suppression under the Fourth Amendment, does not begin and end with a determination that the government lacked good faith. Even where an affidavit contains deliberate or reckless falsehoods, the evidence is admissible under *Franks* if the affidavit contains other information sufficient to support a finding of probable cause. Thus, the reasonableness of counsel's conduct turns on his analysis of the suppression issue under *Franks*.

The *Franks* test is a demanding one because a search warrant carries a presumption of validity. *Franks* at 171. A defendant must point the specific statements alleged to be false and must accompany his motion with an offer of proof. *Id.* "[I]f these requirements are met, and if, when material that is the subject of the alleged falsity or

---

[14] *See* p. 12 n. 7, *supra*.

[15] Based on Mr. Horne's testimony that he probably received Exhibit DD the Court finds by a preponderance of the evidence that Horne did receive Exhibit DD prior to the defendant's guilty plea.

reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue." *Id.* at 171-72.

Petitioner contends that Horne's analysis of the second *Franks* prong – the sufficiency of the warrant once the false statements are set aside – was deficient and amounted to ineffective assistance of counsel. Horne, a very experienced criminal defense attorney, discussed *Franks, Leon* and other Fourth Amendment cases with petitioner and explained his belief that probable cause existed even absent the false statements. According to petitioner, Horne's analysis was wrong, and unreasonable, because Judge Perry in Missouri – the only judge to have ruled on the Candyman affidavit at that time – had reached the opposite conclusion. Of course, one district judge's decision is not binding on another district judge, so a favorable finding in one district does not guarantee the same ruling in another district, even on similar or related facts. Thus, Horne's evaluation of petitioner's case in light of his knowledge of the judge before whom a suppression motion would be heard was not unreasonable. Moreover, the facts are not identical. In *Strauser*, the affidavit's only information regarding the defendant, other than the false information, was "that an email account registered to him subscribed to Candyman on December 26, 2000, and was still a member on February 6, 2001 when the site was shut down" and that the same email account had used two sexually suggestive screen names. *Strauser,* 247 F.Supp.2d at 1144. In contrast, the search warrant affidavit in this

case stated that the email address listed to petitioner subscribed and unsubscribed to the Candyman Group six times between January 22, 2001 and February 2, 2001. From this, one could reasonably conclude that petitioner was not an accidental or inactive member of the email group. From other information in the affidavit it was evident that the purpose of the group was to collect and distribute child pornography and that persons who belong to such a group were likely to store downloaded child pornography in their homes. Considering these facts in light of the probable cause standard, a reasonable attorney who had reviewed *Strauser* and the facts of this case could have concluded that the search warrant affidavit, without the false statements, was sufficient and, therefore, a motion to suppress under *Franks* would not be successful.[16] Under these circumstances, advising petitioner not to pursue a suppression motion and to plead guilty circumstances did not amount to ineffective assistance of counsel.

IV.* Conclusion

Counsel's investigation and advice in this case fall within the wide range of conduct among competent counsel that could be considered reasonable. For that reason, petitioner's motion to vacate, set aside or correct sentence fails.

---

[16] A detailed explanation of the reasons the redacted affidavit could support a finding if probable cause are discussed in detail in the Court's prior § 2255 order, Doc. 63, at 12-14.

* [So in original; should be VI.]

It is, therefore, ORDERED that petitioner's motion to vacate, set aside or correct sentence be and hereby is DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 02-00058-CB
v.	)	
MICHAEL ADAM DAVIDSON,	)	CIVIL ACTION NO. 03-0517-CB
Defendant/Petitioner.	)	

ORDER

Petitioner Michael Adam Davidson has filed a motion seeking a certificate of appealability with respect to the Court's May 1, 2006 order denying his motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. (Doc. 94). "A certificate of appealability may be issued only where the applicant has made a 'substantial showing of the denial of a constitutional right.'" *Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997). This standard is "materially identical" to the standard governing certificates of probable cause under the former 28 U.S.C. § 2253. *Id.*, *accord Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000). In the context of certificates of probable cause, the Supreme Court has defined the requirement of "a substantial showing of the denial of a federal right" to mean that the applicant must raise a constitutional issue that is "debatable among jurists of reason," *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), or, stated differently, one that reasonable jurists would find "debatable or wrong." *Slack*, 529 U.S. at 484. This case involves such an issue.

Although this Court did not find counsel's performance with respect to the Fourth Amendment search issue to be objectively unreasonable under the standards set forth *Strickland v. Washington* 466 U.S. 668 (1984) and its progeny, reasonable jurists might disagree. Accordingly, the application for certificate of appealability is hereby **GRANTED.**

DONE and **ORDERED** this the 12th Day of June, 2006.

s/ Charles R. Butler, Jr.
Senior United States
District Judge

APPENDIX E

138 Fed. Appx. 238

[DO NOT PUBLISH]

[FILED JUNE 24, 2005]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-14325
Non-Argument Calendar

D. C. Docket Nos. 03-00517-CV-CB & 02-00058 CR-CB

MICHAEL ADAM DAVIDSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

D.C. Docket Nos. 03-00517-CV-CB & 02-00058-CR-CB.

PER CURIAM.

This is an appeal from the denial of a motion for 28 U.S.C. § 2255 relief from a judgment of conviction entered

after a guilty plea. We won't belabor the facts or procedural history because the parties and district court are familiar with them.

Davidson's § 2255 motion raised three claims. The first claim is that the conviction violates the Due Process Clause because the government failed to disclose information that would have impeached the statements made in the affidavit supporting the search warrant. This claim fails because the Supreme Court has held that there is no constitutional requirement for the government to disclose impeachment evidence in advance of a guilty plea. *United States v. Ruiz,* 536 U.S. 622, 629, 122 S.Ct. 2450, 2455, 153 L.Ed.2d 586 (2002).

The third claim raised in the § 2255 motion amounts to a request for a new trial on the basis of newly discovered evidence that allegedly impeaches, or tends to impeach, statements made in the search warrant affidavit. Assuming that such a ground for relief can be raised in a § 2255 proceeding, it fails because impeachment evidence will not support a new trial claim. *United States v. Kersey,* 130 F.3d 1463, 1465 n. 2 (11th Cir. 1997) (for a motion for a new trial based on newly discovered evidence to be granted, "the evidence must not be merely cumulative or impeaching").

The second claim raised in the § 2255 motion is one of ineffective assistance of counsel in connection with the guilty plea. The alleged shortcomings of counsel concern his actions (or inactions) and his advice involving the search warrant issues. The district court rejected this claim based on its view that a motion to suppress the evidence obtained from the search would have failed under the test set out in *Franks v. Delaware,* 438 U.S. 154, 98

S.Ct. 2674, 57 L.Ed.2d 667 (1978). That is not, however, the test for the prejudice prong of an ineffective assistance of counsel claim relating to the entry of a guilty plea. Instead, the prejudice inquiry is focused on whether, if counsel had not performed ineffectively, Davidson still would have pleaded guilty. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

It may be that before Davidson pleaded guilty counsel communicated to him all of the information counsel had (and reasonably should have had) bearing on the search warrant issue, and gave Davidson reasonable advice concerning that issue. If counsel did that, the ineffective assistance of counsel claim fails on the performance prong. However, if counsel did not perform within the wide range of reasonable professional assistance, under the Hill decision this claim will turn on whether Davidson would have pleaded not guilty but for the ineffective assistance. Both of those issues should be addressed in an evidentiary hearing.*

We are aware that the district court has already determined that any motion to suppress on *Franks* grounds would have been without merit and thus denied. However under Hill, assuming the deficient performance

---

* In some of his filings in the district court Davidson contended that he requested that his counsel file a motion to suppress, but contentions are not evidence. At the hearing, Davidson will have an opportunity to present evidence on that and other factual issues. If the court finds that Davidson made such a request, it can then determine whether, in light of it, counsel's failure to file a motion to suppress constitutes ineffective assistance. If the court finds that Davidson did not make such a request, it can then decide whether the failure to file a motion to suppress even without a request constituted ineffective assistance.

prong of ineffective assistance is established, the prejudice prong turns not on whether Davidson would have prevailed on a motion to suppress had counsel filed one but instead on whether Davidson would have pleaded guilty had counsel's performance not been deficient. Given the number and nature of Davidson's allegations of ineffective assistance of counsel in regard to entry of his guilty plea, it may be possible for him to establish that he would not have pleaded guilty even if any motion to suppress would have been denied by the district court. Whether he can depends on facts that have not yet been found.

For these reasons, we AFFIRM the district court's judgment except insofar as it involves the ineffective assistance of counsel claim. We VACATE the judgment insofar as the ineffective assistance of counsel claim is concerned and REMAND this case for further proceedings relating to that claim. In doing so, we do not express any view about how the *Franks* issue should be decided if a decision of that issue does become necessary.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
v.	)	02-00058-CB
MICHAEL ADAM DAVIDSON,	)	CIVIL ACTION NO.
Defendant/Petitioner.	)	03-0517-CB
	)	

ORDER

This matter is before the Court on a motion to vacate, set aside or correct sentence filed pursuant to 28 U.S.C. § 2255 by Michael Adam Davidson, a person in federal custody. (Doc. 45.) Petitioner is one of a number of people nationwide who were convicted of possession or receipt of child pornography as a result of the FBI's investigation of a short-lived internet website known as "Candyman." The underlying premise of the claims asserted in petitioner's collateral attack is that evidence seized from his home would have been suppressed, and he would not have pled guilty, if inaccurate information contained in the search warrant affidavit had been brought to the Court's attention. Because the same information was contained in search warrants throughout the country, all of which were derived from the FBI's "template" affidavit, several courts have already addressed the effect of the inaccurate information. In accord with the majority of those courts, this Court finds that the search warrant affidavit provided probable cause even if the disputed information is excluded. Since the existence of probable cause means that the evidence would not have been suppressed, the linchpin

of plaintiffs collateral attack has been removed, and his § 2255 motion cannot succeed.

I. Facts

A. The Candyman Investigation

The following facts related to the FBI's investigation of the Candyman Internet group were set forth by the Fifth Circuit in *United States v. Froman,* 355 F.3d 882 (5th Cir. 2004) and are relevant here:

> On December 6, 2000 pornographer Mark Bates ("Bates") founded an online club called The Candyman Group ("The Group" or "Candyman") using a free internet service called eGroups. In general, internet groups, like those available through eGroups, allow individuals with similar interests to band together and share information through the world wide web. Members of these groups are empowered to share interests, talents, and knowledge. Candyman did not have such a benign purpose. The singular goal of the Group was to collect and distribute child pornography and sexually explicit images of children.
>
> All Egroups are organized into different categories according to interest. Candyman was categorized as an adult, transgender, image gallery, at once suggesting its sexual content. The main web page announced to anyone considering joining the Group its purpose:
>
> > This group is for People who love kids. You can post any type of messages you like too [sic] or any type of pics and vids you like too [sic].

P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.

After reviewing the web page and learning the group's mission, anyone who wished to join the Group could do so either by clicking the subscribe link on the main web page or by sending an e-mail to the group administrator. Those subscribing via the website subscribe link were presented with e-mail delivery options allowing them to choose whether to receive all e-mails addressed to the group as a whole, receive a daily digest of e-mails addressed to the group, or to receive no e-mails and simply review the messages on the website where they are archived. Members who joined via e-mail were sent a confirmation e-mail welcoming the new member to the group but would not necessarily be presented with e-mail delivery options. Subscription to Candyman was free of charge, and simple directions for revoking membership were provided at the bottom of all correspondence. Additionally, both a link and an e-mail address on the Group's main web page could be used to cancel membership.

Once a new member subscribed, he had full access to the website and all of its functions. Members could post electronic pictures and video clips to the website for other members to access and download. They could use the chat feature to converse with each other in real time. Members could use the group to disperse images, videos and text via e-mail. Each message addressed to the group was sent to all members who requested e-mail delivery and was also stored on the website for members to review at their convenience. E-mails were also sent by the Group to members

notifying them of new files that had been posted to the site and at times giving a brief description of the pornography. A poll page was included on the website that allowed group members to vote on matters important to them. Candyman members voted on the types of images they preferred: "What you all like to see more boys or girls and whats age and more actions or more soft pics pick as many as need.[sic]." Finally, a "links" page provided links to other webpages and other online groups that supplied child pornography.

* * *

The investigation of the Candyman Group began in early January 2001, when Special Agent Geoffrey Binney ("Agent Binney"), acting undercover, joined the Group. After subscribing, Binney began receiving all of the e-mails that were addressed to the Group by other members, many of which contained child pornography. From the time Agent Binney joined until the Group was shut down, he received almost 500 e-mails, containing almost 300 images of child pornography or child erotica. Agent Binney further monitored the files uploaded to the website, and captured approximately 100 illegal images and video clips.

In mid January 2001, Agent Binney contacted Yahoo!, identified himself as an FBI agent, and probed for information on the group and its members. The representative from Yahoo! refused to answer Agent Binney's questions. Given the fruitless inquiries on January 19, 2001, Agent Binney obtained a subpoena directing Yahoo! to divulge any identifying information regarding members. Yahoo! responded to the subpoena on February 6, 2001. It shut down the site and provided Agent Binney with a list of

> approximately 3400 e-mail addresses of individuals who were Group members when Candyman was shut down. The list provided no indication that e-mail delivery options were available to members.
>
> Agent Binney and the FBI sorted the 3400 e-mail addresses in the member list by e-mail address providers, and sent grand jury subpoenas to those providers, requesting Group members' names, addresses, phone numbers, and any other identifying information. Once the FBI obtained addresses from service providers, Group members were assigned to local FBI offices for further investigation. Agent Binney provided local offices with template search warrant affidavits which contained all of the basic information that had been collected in the investigation. Local agents could simply fill the gaps in the affidavit with the suspect specific information and present that affidavit to a magistrate to obtain a warrant.

Id. at 885-86 (footnotes omitted).

B. Problems with the Template Search Warrant Affidavit

In May 2002, after numerous searches and arrests based on the template affidavit provided by Agent Binney, the government learned that an important allegation in the search warrant affidavits might not be true. The affidavit alleged that "[e]very email sent to the group was sent to every member [of the Candyman Group] automatically" when, in fact, group members who joined via the website were given the option to decline the automatic email feature. In June 2002, the government confirmed that the "no email" option existed, so that all members of

the group did not necessarily get all emails. The import of this information was that the pictures and videos of child pornography received by Agent Binney while he was a member of the group were not necessarily emailed to every member of the group. Nonetheless, all members of the group had access to the pictures and videos on the group's website.

In various proceedings after the existence of the "no email" option was discovered, Agent Binney testified that he joined the Candyman Group via email, rather than the website, and therefore, would not have seen the "no email" option when he joined. Subsequently, the government discovered that Yahoo records contradicted Agent Binney's claim that he joined via e-mail. According to Yahoo, Agent Binney joined the group via the website and, therefore, would have been confronted with the "no email" option.

C. The Search Warrant Affidavit in this Case

The search warrant affidavit in this case, which was signed by Special Agent Tracy Lollis and appears to be based on the template affidavit provided by Agent Binney, contained the misstatement regarding the automatic email feature, i.e., that "all new members of the Egroup were immediately added to the Candyman e-mail list[ ]" and that "[e]very e-mail sent to the group was distributed to every member automatically." But the affidavit also contained extensive information about the nature and purpose of the Candyman website, in general. For instance, the affidavit stated:

> **Website Features:** The Candyman website had several different features. First, the "Files" section provided an area for members to post images

> or video files for others to download . . . The "Polls" section allowed the group members to engage in survey activity, e.g., asking "what age group do you prefer?" The "Links" section allowed members to post the URL's for new websites containing similar content. Lastly, the "Chat" section allowed users to engage in real-time conversations among themselves.
>
> **Images Posted on the Website:** The primary feature of the Candyman Egroup's website was the "Files" section. This allowed members to upload and download images directly to and from the website. SA Binney was a member of the Egroup from January 2, 2001 until February 6, 2001 when Yahoo! closed down the Egroup. During that time, SA Binney captured approximately 100 images and video clips [containing child pornography] that had been uploaded to the website.

Furthermore, the affidavit related the purpose of the group, as stated on the website's main page (also quoted in *Froman, supra* p. 2), that the site is for people who "love kids" to post "any type" of pictures or videos they like.

With respect to the petitioner, Michael Adam Davidson, the search warrant affidavit alleges that Yahoo's records revealed the email address looptone@aol.com was listed as a member of the Candyman Egroup and that the email address belonged to Michael Adam Davidson, at the street address listed on the search warrant. According to the affidavit, looptone@aol.com (Davidson's email address) subscribed and unsubscribed to the Candyman Group six times between January 22, 2001 and February 2, 2001.

In addition to the information about the Candyman website and petitioner's connection to that website, the affidavit also contained general information about the

traits and characteristics of persons who collect child pornography, which was provided by Supervisory Special Agent James Clemente, an FBI behavioral analyst who specializes in "child exploitation cases." Among the observations offered by SSA Clemente: Such persons "receive sexual gratification and satisfaction from sexual fantasies fueled by depictions of children that are sexual in nature" and also use child pornography as a means of understanding and justifying their feelings. These individuals tend to seek out like-minded people either in person or on the internet, in part, to rationalize or justify their own deviant behavior. And, they "rarely, if ever, dispose of their sexually explicit materials" which they "almost always maintain in . . . their homes or other secure location." (Search Warrant Aff, pp. 10-11.)

D. Petitioner's Arrest, Guilty Plea & Sentencing

On March 19, 2002, using the search warrant affidavit described above, the local FBI office obtained a search warrant for petitioner's residence. A computer diskette containing images of child pornography was found in the residence, and petitioner was arrested. Ultimately, petitioner was charged in a superseding indictment with receipt of child pornography, possession of child pornography and receipt of obscene matters from an interactive computer service. Petitioner retained attorneys Richard Horne and James Dailey to represent him. Petitioner's arraignment was delayed until August 7, 2002 due to his hospitalization for psychiatric treatment. His trial was scheduled for the October 2002 trial term with jury selection to commence on September 30, 2002.

In a letter dated July 16, 2002, the Assistant United States Attorney assigned to this case, Maria Murphy, sent a letter to Mr. Horne explaining the inaccuracy in the search warrant affidavit regarding the automatic e-mail feature. The letter explained that subscribers to the Candyman Group had the option to receive no emails. In addition, the letter provided Agent Binney's explanation for the misstatement, that is, that Binney never saw the "no email" option because he joined the Group via email, where the option was not available, rather than via website, where it was.

On September 30, 2002, the date set for jury selection, Davidson entered a plea of guilty to Count One of the Superseding Indictment, which charged him with receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1). The remaining substantive charges were dismissed as part of a plea agreement.[1]

Nine days after the guilty plea, petitioner's attorney, Richard Horne, received a letter from AUSA Murphy providing additional information about Agent Binney and the inaccuracies in the search warrant affidavit.[2] The letter restated the difference between subscribing via web (where the "no email" option was provided) and via email (where there was no such option) and provided further detail of Binney's explanation that he subscribed to the

---

[1] Petitioner also confessed to the allegations of the two forfeiture counts and agreed to the forfeiture of certain property seized by the FBI..

[2] The letter is dated September 16, 2002. Oddly, it is date-stamped by the *sender's* office "Received U.S. Attorney's Office October 7, 2002." Another date stamp indicates it was received by Mr. Horne's office on October 9, 2002.

Candyman Group via email and, therefore, did not see the "no email" option. In addition, the letter also explained that records "recently produced" by Yahoo! indicated that Binney subscribed to Candyman via web.

At various times throughout the discovery and pretrial phase of the proceedings, petitioner told Mr. Horne and Mr. Dailey that he did not receive email from the Candyman Group and that the search warrant affidavit was wrong in this regard. After his arrest and again in May 2002, petitioner discussed with counsel this inaccuracy in the search warrant affidavit and questioned how the government had probable cause to search when he did not receive any emails from the Candyman Group. In July 2002, petitioner read an article in the St. Louis Post Dispatch regarding the Candyman Group and the email options. Petitioner called this article to Mr. Horne's attention and requested that he file a motion to suppress, but none was filed. In January 2003, while looking through counsel's files in preparation for his sentencing hearing two days hence, petitioner found the second letter from AUSA Murphy informing counsel of the discrepancy between Agent Binney's account that he joined Candyman via email and Yahoo!'s records that he joined via web. Mr. Horne had never informed petitioner of this letter.

At the sentencing hearing on January 29, 2003, petitioner was sentenced to a term of imprisonment of 33 months. The petitioner did not file an appeal. The government, however, appealed the sentence, asserting that the Court should have applied the sentencing guidelines provision applicable to trafficking in child pornography rather than the provision applicable to possession of child pornography. The sentence was affirmed on appeal.

II. Legal Analysis

A. Standard of Review

Habeas relief is an extraordinary remedy which "may not do service for a [] [direct] appeal." *United States v. Frady,* 456 U.S. 152, 165 (1982). A defendant who has waived or exhausted his right to appeal is presumed to stand "fairly and finally convicted." *Id.* at 164. Unless a claim alleges a lack of jurisdiction or constitutional error. the scope of collateral attack has remained extremely limited. *Addonizio v. United States,* 442 U.S. 178, 185 (1979). In general, claims not raised on direct appeal may not be considered on collateral attack. A petitioner can, however, overcome his procedural default of claims not raised on direct appeal. The burden a petitioner must meet differs, depending upon the type of claim he raises. First, "nonconstitutional claims can be raised on collateral review only when the alleged error constitutes a fundamental defect which inherently results in the miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Burke v. United States,* 152 F.3d 1329, 1331 (11th Cir. 1998) (citations and internal quotations omitted). A petitioner's burden with regard to constitutional claims not presented on direct appeal is slightly less stringent. Constitutional claims may be considered if the petitioner can "show cause excusing his failure to raise the issues previously and actual prejudice resulting from the errors." *Cross v. United States,* 893 F.2d 1287, 1289 (11th Cir. 1990). Jurisdictional issues, however, are not subject to procedural default because federal courts are of limited jurisdiction and the parties cannot by waiver or default confer a jurisdictional foundation that is otherwise lacking. *Harris v. United States,* 149 F.3d 1304, 1307 (11th Cir. 1998).

B. Issues Raised

Petitioner raises three claims in his § 2255 motion. First, he contends that the government violated his constitutional right to due process by withholding exculpatory evidence, that is, information that tended to show that the search warrant affidavit contained statements that were either deliberate falsehoods or made with reckless disregard for the truth. Second, petitioner claims he is entitled to relief because counsel's constitutionally ineffective assistance resulted in a guilty plea that was not knowingly and voluntarily entered. Finally, petitioner asserts that much of the evidence related to the misstatements in the search warrant affidavit is newly discovered and, therefore, entitles him to relief In response, the government argues that petitioner's guilty plea operates as a waiver of all claims, that the *Brady* and newly discovered evidence claims are waived by the terms of his plea agreement, that the claims are procedurally barred because petitioner failed to raise them prior to his guilty plea or on direct appeal, and, finally, that the claims are due to be denied on the merits. Because the Court agrees with the government's assessment of the merits, there is no need to address the issues of waiver and procedural bar.

C. Discussion

A key element of each of petitioner's claims – whether based on *Brady* violations, ineffective assistance of counsel or newly discovered evidence – is the requirement that the omission, deprivation or error alleged made a difference in

the outcome of the proceedings.[3] The proceedings would have been different, according to petitioner, because a motion to suppress would have been filed if all the facts about the search warrant affidavit had been revealed and/or counsel had properly evaluated the facts that were known. Petitioner asserts that there is a strong likelihood that the motion to suppress would have been successful, resulting in the exclusion of the government's evidence against him. In this scenario, of course, the defendant would not have pled guilty.[4] Petitioner's theory fails,

---

[3] A *Brady* violation provides a basis for relief only if there is a reasonable probability that disclosure of the evidence would have produced a different result. *See, e.g., United States v. Brown,* 250 F.3d 811, 818 (3d Cir. 2001). Similarly, a claim that counsel rendered constitutionally ineffective assistance by failing to investigate potentially exculpatory evidence must must [sic] be evaluated in light of the effect of the evidence would have had on the decision to enter a guilty plea. *Stano v. Dugger,* 921 F.2d 1125, 1150 (11th Cir. 1991). That, in turn, often depends upon whether the evidence would likely have changed the outcome of the trial. *Id.* Petitioner's newly discovered evidence claim is not cognizable in a § 2255 motion absent an independent constitutional violation, so the mere fact that the evidence is exculpatory does not provide a basis for relief. *See Herrera v. Collins,* 506 U.S. 390, 400 (1993) (claims of actual innocence based on newly discovered evidence do not state grounds for habeas relief unless there is an underlying constitutional violation). However, assuming, *arguendo,* that newly discovered evidence could provide grounds for relief, the evidence must be of such a nature that it would probably have produced a different result. *See United States v. Hall,* 854 F.2d 1269, 1271 (11th Cir. 1988).

[4] Petitioner alternatively asserts that he might have entered a conditional guilty plea and appealed if a motion to suppress had been filed and denied. In this scenario, the outcome of the proceedings would have been different only if the denial had been reversed by the appellate court. Still, the issue is the merits of petitioner's claim that the search warrant affidavit is defective and does not support a finding of probable cause.

however, because a suppression motion would not met [sic] with success.

In *Franks v. Delaware,* 438 U.S. 154 (1978), the Supreme Court held that a search warrant affidavit bears a presumption of validity; therefore, a hearing on a motion to suppress based on flaws in such an affidavit will be granted only if: (1) the motion contains specific allegations, accompanied by an offer of proof, that the search warrant contains deliberate falsehoods or statements made with reckless disregard for the truth *and* (2) when considered without the alleged falsehoods, the affidavit is insufficient to support a finding of probable cause. *Id.* at 171-72. When considered without the alleged falsehoods attributable to Binney, the search warrant affidavit was sufficient to support a finding of probable cause. Therefore, the evidence seized in the search of petitioner's home would not have been suppressed, and there is no logical reason to believe that petitioner would have chosen to go to trial rather than enter a guilty plea.

Several courts have reviewed, under *Franks,* the validity of nearly identical search warrant affidavits in other Candyman prosecutions and have reached differing conclusions. The issue common to those cases, and the instant case, is whether the evidence obtained as a result of the search warrants should be (or should have been) suppressed because of allegations that Agent Binney, either deliberately or recklessly, made false assertions that were contained in the search warrant affidavits. The majority of courts have concluded that, even absent the alleged falsehoods, the affidavit was sufficient to support a finding of probable cause. *See United States v. Froman,* 355 F.3d 882 (5th Cir. 2004); *United States v. Hutto,* 84 Fed. Appx. 6 (10th Cir. 2003) (unpublished); *United States*

v. Shields, 2004 WL 832937 (M.D. Pa. Apr. 14, 2004) *United States v. Bailey,* 272 F. Supp. 2d 822 (D. Neb. 2003); *United States v. Coreas,* 259 F. Supp. 2d 218 (E.D.N.Y. 2003). Other courts, however, have granted motions to suppress after concluding that Binney's misstatements were either deliberate or reckless and that probable cause did not exist once those allegations were removed from the affidavits. *See United States v. Perez,* 247 F. Supp. 2d 459 (S.D.N.Y. 2003); *United States v. Strauser,* 247 F. Supp. 2d 1135 (E.D. Mo. 2003); *United States v. Kunen,* 2004 WL 1462503 (E.D.N.Y. June 30, 2004).[5]

This Court agrees with the majority that probable cause remains even when the erroneous statements regarding email delivery are removed from the search warrant affidavit. "Probable cause to support a search warrant exists when the totality of the circumstances allow a conclusion that there is a fair probability of finding contraband or evidence at a particular location. *United States v. Brundidge,* 170 F.3d 1350, 1352 (11th Cir. 1999); *see also Illinois v. Gates,* 462 U.S. 216, 238

[5] Interestingly, a panel of the Second Circuit, which encompasses the *Perez* and *Kunen* courts, has opined in an unpublished opinion that "[w]ere we to look to the merits [of defendant's claim that absent Binney's misstatements the Candyman affidavit did not support a finding of probable cause], we would be inclined to agree with the majority of courts to have decided the issue, that even without the intentional misstatement, the affidavit supported probable cause to search." *United States v. Schmidt,* 96 Fed.Appx. 41 (2d Cir. 2004) (unpublished). The court affirmed the lower court's denial of defendant's motion to withdraw his guilty plea, however, on the grounds that it was not based on a claim of actual innocence and was made between three and eight months after he learned of problems with the search warrant affidavit.

(1991) (adopting "fair probability" definition). From a redacted affidavit, one can reasonably conclude that child pornography was likely to be found at the petitioner's home, whether or not it was delivered via email. It is fairly obvious, at least to all but the extremely naive, that the Candyman Group existed for the purpose of receiving child and distributing child pornography and erotica.[6] *Froman*, 355 F.3d at 888. Furthermore, the affidavit established that the website could easily be used to download pornography. Members could "upload and download images of child pornography" from the website, could provide "input as to the types of images they preferred" and were directed to other websites with similar contents. *Id.* at 889. The affidavit also permitted a reasonable inference that petitioner Davidson likely knew the contents of the website and purposefully and voluntarily became a member, since it alleges that he subscribed and unsubscribed to the Candyman Group six times over an 11-day period.[7] Finally, based on the affidavit's description of the tendencies of persons who collect child pornography, one could reasonably infer that a person who voluntarily joined a group such as Candyman was likely to download and save the images of child pornography available to members on the website.

---

[6] This conclusion is supported by the affidavit's recitation of the website's stated purpose, *i.e.*, that it is for "people who love kids" to post "any type" of messages, pictures and videos, and by the affidavit's description of the types of pictures and videos (hundreds of images of child pornography) Agent Binney observed on the website during the short period of time it was in operation.

[7] It is highly unlikely that the petitioner happened upon the website and became a member by mistake or accident. While one might inadvertently hit upon a website while browsing the internet, subscribing and unsubscribing to an illicit site roughly every other day for almost two weeks indicates intentional participation.

Petitioner argues that the automatic email is essential to a finding of probable cause because otherwise there is no evidence that child pornography was delivered to his computer. According to petitioner, mere membership in the Candyman Group is not enough to establish probable cause because there were "constitutionally protected" activities that he could have engaged in, such as "partici-pat[ing] in a 'chat with other like-minded individuals about child pornography." (Pet.'s Reply Brf. p. 20.) The *possibility* that the subject of a search warrant *may not* be engaging in illegal activity does not, in itself, negate the *fair probability* that he *is*. The totality of the circumstances described in the warrant leads to the reasonable conclusion that the primary purpose of joining the Candyman Group was to view, exchange and download child pornography and that petitioner voluntarily became a member of that group and, therefore, was likely to have downloaded and retained child pornography obtained from the website.

III. Conclusion

Even if the facts asserted in the petitioner's motion are true, the outcome of the proceedings would not have been different. After the alleged false or reckless statements are disregarded, the search warrant affidavit contains sufficient information to support a finding of probable cause.[8] Therefore, it is **ORDERED** that the

[8] Petitioner's § 2255 motion does not require an evidentiary hearing because the files and records conclusively demonstrate that his claims have no merit, and, therefore, he is not entitled to relief. Furthermore, the discovery requested by petitioner is unnecessary because these requests are calculated to assist petitioner in proving facts that the Court has, for the purpose of considering petitioner's

(Continued on following page)

motion to vacate, set aside or correct sentence be and hereby is **DENIED**.

DONE this the 19th day of July, 2004.

/s/ CHARLES R. BUTLER, JR.
UNITED STATES DISTRICT JUDGE

---

§ 2255 motion, assumed to be true. Consequently, petitioner's "Request for Leave of Court for Discovery" (doc. 60) is **DENIED**.

APPENDIX G

360 F.3d 1374

[FILED MAR. 1, 2004]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-10613

D. C. Docket Nos. 03-00517-CV-CB & 02-00058 CR-CB

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MICHAEL ADAM DAVIDSON,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Before CARNES and WILSON, Circuit Judges, and HANCOCK,* District Judge.

PER CURIAM:

The government appeals the thirty-three month sentence of Michael Adam Davidson, imposed following

---

* Honorable James H. Hancock, United States District Judge for the Northern District of Alabama, sitting by designation.

Davidson's plea of guilty to Count One of a superseding indictment charging him with receiving and attempting to receive images of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2) and (b)(1). The government challenges Davidson's sentence on the theory that the district court erred in sentencing him under United States Sentencing Guideline § 2G2.4 rather than under sentencing guideline § 2G2.2. Specifically, the government asserts that because Davidson pled guilty to receipt of child pornography under 18 U.S.C. § 2252A(a)(2), and not merely possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B), the language and history of § 2G2.2 dictates that it, and not § 2G2.4, is the appropriate sentencing guideline. Concluding that our prior decision in Dodds instructs that § 2G2.4 is the appropriate guideline to be applied under the facts of this case, we affirm the sentence imposed by the trial judge.

In an indictment filed March 28, 2002, Davidson was charged with fifteen counts of receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(1). Apparently because § 2252A(a)(1) does not proscribe receipt of child pornography, a five-count superseding indictment was filed August 30, 2002. As relevant to this appeal, Davidson was charged in Count One of the superseding indictment with receiving and attempting to receive child pornography in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1).[1] Pursuant to a written

[1] Count One of the superseding indictment reads that "Michael Adam Davidson did knowingly receive and attempt to receive images of child pornography as defined in 18 U.S.C. § 2256(8)(A) that had been shipped and transported in interstate and foreign commerce, specifically by computer." The facts underlying the charge in the superseding indictment are not in dispute. Davidson and the government jointly

(Continued on following page)

plea agreement Davidson pled guilty on September 30, 2002 to the Count One charge in the superseding indictment.

At Davidson's sentencing, the district court considered and relied upon the Presentence Investigation Report, which recommended that U.S.S.G. § 2G2.4 be used to calculate Davidson's base offense level.[2] The district court determined that the proper guideline range was twenty-seven to thirty-three months and sentenced Davidson to thirty-three months imprisonment to be followed by three years supervised release. The district court reasoned that § 2G2.4 is applicable to all receipt of child pornography offenses unless there is specific evidence that the defendant distributed or intended to distribute the child pornography, in which case § 2G2.2 would be the appropriate sentencing guideline. There was no such evidence before the district court.

Once the statute of conviction has been determined, the sentencing court, as does this Court, turns for assistance in determining the applicable offense guideline to the Statutory Index set forth as Appendix A to the Guidelines Manual. *See United States v. Saavedra,* 148 F.3d 1311, 1315 (11th Cir. 1998). This Court gives due deference

---

filed a "Factual Resume" in conjunction with the written plea agreement.

[2] Paragraph 29 of the Presentence Investigation Report correctly states that when calculating Davidson's base offense level, the starting point is the fact that "the guideline for an offense charged under 18 U.S.C. § 2252A(a)(2) is found at U.S.S.G. § 2G2.2 or § 2G2.4." District Judge Butler stated that the probation officer "has correctly analyzed the applicable guideline section and the reasons for it . . . I think this is clearly a case where the more appropriate guideline is the possession, the one that's been applied."

to the district court's application of the sentencing guidelines to the facts and reviews decisions of interpretation of the Federal Sentencing Guidelines to those facts de novo. *See United States v. Singh,* 291 F.3d 756, 763 (11th Cir. 2002) (citing *United States v. Yount,* 960 F.2d 955, 956 (11th Cir. 1992) and *United States v. Trout,* 68 F.3d 1276, 1279 (11th Cir. 1995)). But this Court reviews de novo "whether the district court applied the correct sentencing guideline (or subsection of a sentencing guideline) for the defendant's underlying conduct." *United States v. Williams,* 340 F.3d 1231, 1240 (11th Cir. 2003) (citing *United States v. De La Mata,* 266 F.3d 1275, 1302 (11th Cir. 2001)).

The Statutory Index regarding violations of 18 U.S.C. § 2252A lists both U.S.S.G. §§ 2G2.2 and 2G2.4 as the guidelines applicable to violations of 18 U.S.C. § 2252A. Where two guidelines are referenced in the Statutory Index as being applicable to a single statute, the court is to "use the guideline section most appropriate for the offense conduct charged in the count of which the defendant was convicted."[3] U.S.S.G.App. A, intro.

The issue for us to determine is whether the district court appropriately used § 2G2.4 rather than § 2G2.2 in determining the sentencing guideline range where the defendant had been convicted of receipt of child pornography under 18 U.S.C. § 2252A(a)(2) without any evidence that the defendant received the pornography with an intent to traffic in the pornography. This Court is bound on this issue by the decision reached in *United States v.*

---

[3] A Sentencing Commission policy statement cautions that a pure "real offense" approach to sentencing and a pure "charge offense" approach to sentencing both have drawbacks. *See* U.S.S.G. Ch. 1, Pt. A(4)(a) (2002).

Dodds, 347 F.3d 893 (11th Cir. 2003). The issue presented in *Dodds* was whether a sentence applying § 2G2.2 requires evidence of the defendant's intent to traffic in child pornography where the defendant had been convicted of knowingly possessing material that contained images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and of knowingly receiving obscene pictures in violation of 18 U.S.C. § 1462. *See id.* at 900-02. Agreeing with the defendant's argument that the statutory purpose of § 2G2.2 was to punish receiving only when pornography is received with the intent to traffic, the *Dodds* court stated that "§ 2G2.2 was intended to apply where the government has shown that the defendant had received with the intent to traffic." *Id.* at 901. *Dodds* discredits the government's argument made in the instant case that § 2G2.2 should apply to all cases in which a defendant has been convicted of receiving child pornography, regardless of intent to traffic, and instructs that "§ 2G2.2 was meant to punish crimes related to the trafficking of child pornography, while § 2G2.4 is reserved for punishing those who merely possess child pornography . . . " *Id.* at 902.

In the instant case the district court properly applied guideline § 2G2.4 in sentencing Davidson.

AFFIRMED.

APPENDIX H

[FILED FEB. 6, 2007]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12705-CC

On Appeal from the United States District Court
for the Southern District of Alabama

Before: ANDERSON, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED